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This Issue in Brief

A Consumer's Guide to the Electronic Monitoring of Probationers.—In order to address the problems of institutional overcrowding, additional demands for services have been placed on probation departments. Administrators have found it necessary to explore new supervisory strategies which will meet the needs of the agency and the offender and at the same time be responsive to the concern for public safety. One proposed alternative is the use of electronic monitoring devices. In this article, authors Charles M. Friel and Joseph B. Vaughn focus on the administrative and policy issues which should be addressed by those agencies considering implementation of a monitoring program. According to the authors, the technology will not solve the overcrowding problem and may not be appropriate for all probation departments. The ultimate consideration should be whether its use reduces risk to the public or enhances the opportunity for rehabilitation any better than conventional supervisory strategies which cost less.

Complex Policy Choices: The Pennsylvania Commission on Sentencing.—In 1982 the Pennsylvania General Assembly adopted sentencing guidelines submitted by the Pennsylvania Commission on Sentencing. This adoption culminated almost 3 years of work by the Commission during which an initial set of guidelines was rejected by the General Assembly. Pennsylvania's sentencing guidelines differ from those in Minnesota and Washington in that sentences must still be indeterminate and parole release is maintained. Authors John H. Kramer and Anthony J. Scirica review the major decisions made by the Commission in writing the guidelines, including whether to write descriptive or prescriptive guidelines, whether to limit the guidelines to current capacity, and how the Commission ranked criminal offenses and prior convictions. The authors note that writing sentencing guidelines is a complex process involving many difficult and controversial choices, not the least of which involves the Commission's trust in the judiciary.

Privatization of Corrections: Defining the Issues.—The concept of prison and jail privatization looms large on the horizon. Its proponents claim that it can solve many of the problems that corrections now faces, while its critics raise both legal and policy challenges. Author Ira P. Robbins surveys the many issues that are involved and cautions us not to rush into privatization without considering these issues more completely. Above all, any attraction that privatization may offer should not entice us to avoid the broader questions of the criminal justice system.

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Pitfalls in Criminal Justice Evaluation Research: Sampling, Measurement, and Design Problems.—Evaluation research has become increasingly popular over the last 10 years, particularly in the area of criminal justice. Focusing on some of the more common problems in sampling, measurement and design, author Julie Leibrich draws on examples from recent research in the area of justice in New Zealand. She discusses sampling problems of selection, nonresponse, volunteer, mortality, wrong-sample size, and missing data bias. In measurement, the article outlines the areas of insensitive measure, instrumentation, and unacceptability bias. The design problems of maturation, history, and prior difference bias are also discussed.

Crime Victim Reparation: Legislative Revival of the Offended Ones.—Author Ken Peak traces the historically changing fortunes of crime victims, culminated by the recently enacted Federal Victims of Crime Act of 1984. Attitudes toward crime victims by various civilizations, levels of government, legislators, and the police are discussed. According to the author—following the early patronizing treatment by most if not all societies—there were several centuries of neglect of crime victims and a concomitant demise of their former lofty status. However, the extent and spreading nature of victim compensation programs in the United States, coupled with new Federal financial assistance to these programs, signal a new era—a modern revival—for the offended ones.

Achieving Reform in Unstable Institutions: A Theoretical Perspective.—According to author Salvatore Cerrato, the goal of stability in our nation's prisons has given way to a maintained condition of stagnant order. The failure of administrators to conceive a well-developed policy of internal reform, he contends, threatens to make instability in our institutions a permanent problem. This article examines the relationship between social change, correctional philosophy, reform groups, policy implementation, and administration in the reform of unstable institutions. The effect of placation and its consequences for the future of our penal institutions is detailed, and suggestions are offered for creative solutions to the dilemma of correctional instability.

The Management and Treatment of Institutionalized Violent Aggressors.—Minimizing institutional violence is a pressing concern for institutional security, administrative, and treatment personnel. Author H. R. "Hank" Cellini contends that treatment must be preceded by systematic and consistent management strategies. According to Cellini, the dictum is concern for management first, then concern about treatment. The purpose of this article is threefold: (1) to discuss security concerns for crisis intervention and long-term management of violent aggressors; (2) to offer policy and program direction for the facility administrator; and (3) to provide some direction for clinicians in the development of treatment programs for violent aggressors. With some small modifications, the information provided can be applied to prisons, mental hospitals, and forensic treatment units.

Beyond Deterrence: A Study of Defenses on Death Row.—Controversy over the deterrent value of the death penalty continues. Meanwhile, death row populations continue to rise and public opinion polls show an overwhelming majority to favor retention of the death penalty. It is in this context that authors Charles E. Smith and Richard Reid Felix present their study of a group of inmates on North Carolina's death row. These death row inmates appeared to be psychologically well defended, their most prominent defenses being denial and suppression. The authors question the extent to which these defenses may be reinforced by the isolation and hopelessness which pervades death row.

The Violent Older Offender: A Research Note.—Using a national sample of offenders in jails, author Karen M. Jennison analyzes older violent offenders who comprise a real, though small, component of all offenders. According to Jennison, older offenders' use of alcohol is significant. Older violent offenders usually have a record of previous violent offenses, and alcohol plays a major role in these offenses. Its influence, claims the author, warrants further study.

Probation in Illinois: Some New Directions.—Achieving meaningful reform in local probation is often a slow, unproductive process. According to authors Gad S. Bensinger and Magnus J. Seng, that certainly was the situation in Illinois where for decades attempts to upgrade probation services in a significant manner were largely unsuccessful. However, beginning in the mid-1970's significant change began to occur and has now resulted in truly new and important changes in the manner in which probation is to be implemented. This article examines some of the more critical factors and developments which contributed to this process.

All the articles appearing in this magazine are regarded as appropriate expressions of ideas worthy of thought, but their publication is not to be taken as an endorsement by the editors or the Federal probation office of the view set forth. The editors may or may not agree with the articles appearing in the magazine but believe them in any case to be deserving of consideration.

A Consumer's Guide to the Electronic Monitoring of Probationers

BY CHARLES M. FRIEL and JOSEPH B. VAUGHN*

Criminal Justice Center, Sam Houston State University

DURING THE 1970's, crime escalated beyond most predictions and seemingly, beyond the ability of anyone to control it. As fear of crime increased, so did the public's demand that something be done. In response, numerous statutes were enacted during this period which reflected the growing demand for crime control. The principal policy objectives of this era seemed to be:

- Increase the probability that those convicted would be incarcerated.
- Increase the duration of their incarceration.
- Reduce the probability of offenders being released before serving the full term of their sentences.

Not surprisingly, these policy changes—coupled with the increasing number of offenders moving through the justice system—resulted in a massive institutional overcrowding problem which has had profound and irrevocable effects on both local jails and state prison systems. The ripple effects of overcrowding precipitated a correctional case law revolution which raised a variety of challenges to the constitutionality of the nation's correctional system. As a result, policy makers have been confronted with a two-headed dragon, neither head of which could be chopped off without increasing the dangerousness of the other. If the public's demand for punishment were to be accommodated, institutions would become more crowded and legal sanctions would ensue. Conversely, building more institutions, a fiscally objectionable alternative, or reducing prison populations by greater use of parole, would likely fly in the face of public sentiment. Neither alternative was attractive, since few policy makers wanted to ask the public to choose between their pocketbook and their demands for safety.

Prompted by legal pressure, alternatives to incarceration, including increased use of probation, were explored. By the end of 1982, for example, 61 percent of all adults under correctional supervision were on probation, with an additional 11 percent on parole, resulting in 7 out of 10 convicted offenders being supervised in the community (Bureau of Justice Statistics 1983).

The demands placed on probation over the past few years have been extraordinary. Not only is the nation's probation system expected to handle an increased number of offenders with relatively fewer resources, but also to supervise a more diversified group of offenders in terms of both risk and need. To accommodate this sudden shift in clientele, administrators have found it imperative to look for new supervisory strategies capable of both meeting the needs of offenders and the demands of the public. This has resulted in the emergence of a variety of new approaches to probation, including intensive supervision probation (ISP), an increasing dependency on contractual services, the promulgation of specialized caseload strategies for use with drug and alcohol dependent offenders and sex offenders, and—most recently—the use of electronic monitoring devices (EMD).

The purpose of this article is to explore some of the administrative and policy implications of the electronic monitoring of probationers. One can find scattered references to the potential use of telemetry in the supervision of offenders in both the futurist and criminal justice literature as far back as the late 1960's and early 1970's (Ingraham and Smith 1974). However, it was not until the prison overcrowding problem created an unprecedented demand for diversion that market conditions were attractive enough to encourage the private sector to make the technology commercially available. Over the past 2 years, several companies have been marketing different versions of EMD which have broad potential applications in corrections. Because the technology is new, there is not yet a body of empirical knowledge assessing its utility and cost-benefit (Berry 1985). Therefore, this article can only speculate on potential applications, abuses, and administrative and policy implications, since time must pass before empirical evaluations can be conducted.

In the absence of such evaluative studies, the method employed in this study involved a series of telephone interviews with probation administrators, users of the technology, and manufacturers. The intent was not to interview a random cross section of the field, but to confer with informed invidivuals on the possible issues raised by the use of the technology. The interviews centered around the following questions:

* Dr. Friel is a professor and Mr. Vaughn is a doctoral fellow at the Criminal Justice Center, Sam Houston State University, Huntsville, Texas.

- What is electronic monitoring technology and how does it work?
- What is the cost-benefit of t[illegible] technology?
- What functional characteristics of the technology are important to probation?
- What kinds of offenders might be good candidates for the technology?
- Does the technology necessitate any special administrative considerations?
- What are the potential abuses of the technology?
- What philosophic issues does the technology raise for probation administrators?

What is Electronic Monitoring and How Does It Work?

Interviews with probation administrators suggested that the term "electronic monitoring" is a bit ambiguous, since three different meanings attach to the term.

- The use of a conventional telephone to call the probationer during curfew hours to determine whether she or he is at home.
- A computer which automatically dials the probationer's telephone and receives voice and/or electronic identification.
- Systems wherein the probationer wears a transmitting device which sends a radio signal to a receiver attached to the probationer's phone which can communicate with a computer.

Although some of the observations presented in this article can be applied to all three forms of electronic monitoring, most are concerned with the latter two.

The basic idea behind electronic monitoring is twofold: divert offenders from incarceration and confine them in their place of residence during specified curfew hours. Typically, offenders in such a program are required to be in their residence during the evening hours and on weekends. Depending upon the particular system employed, some form of telephone communication is used to verify that the offender is at home during specified hours. For example, some intensive supervision programs simply use conventional telephone communications to achieve this objective. More recently, however, several companies have introduced automated telecommunications systems which can achieve the same objective, thereby eliminating the actual involvement of probation officers in making calls.

One form of the technology which is offered by several companies requires the probationer to wear a small transmitter.[1] The transmitter emits a radio signal which is picked up by a receiver attached to the probationer's telephone. During curfew hours, the receiver automatically dials the monitoring computer to advise whether it is receiving a signal from the transmitter. If so, the computer assumes that the probationer is at home. If not, the computer registers a potential curfew violation and notifies the person monitoring the system.

Another version of the technology uses a wrist band instead of a transmitter.[2] In this case, a computer dials the probationer's home during curfew hours, the probationer is asked to identify himself, insert an identification bracelet worn on the wrist into a receiver attached to the phone, and the receiver sends a signal back to the computer. If the telephone is not answered, or the bracelet is not inserted into the receiver, the computer notes a potential violation.

It is not the intention of this article to evaluate the hardware systems offered by different manufacturers. Instead, the purpose is to explore the administrative and policy issues raised by the use of such technology. The National Institute of Justice is currently conducting benchmark tests of the equipment offered by several companies, and the results should be available in the near future.[3]

Companies currently offering electronic monitoring systems include Advanced Signal Concepts, Contrac, Control Data Corporation, Computrac, Correctional Services, Inc., Cost Effective Monitoring Systems, Life Sciences Research Group, Inc., Controlec Inc., Digital Services Inc., and Voxtron. As of this writing, there are several agencies either using the technology or conducting feasibility studies. These include correctional agencies and private service corporations in Florida, Idaho, Kentucky, Michigan, New Jersey, Oklahoma, Oregon, Pennsylvania, Texas, and Utah.

Cost-Benefit of Electronic Monitoring

It is premature to attempt to determine the actual cost-benefit of the technology. It has been only recently introduced to the field and only time will tell whether the benefits derived outweigh the costs. In addition, the question of cost-benefit is complex, not simple. The assessment of costs and benefits varies depending upon one's point of view—for instance, the sheriff with an overcrowded jail versus the probation department which may have to pay for the technology. In addition to the direct cost of purchasing equipment, there are the indirect costs of operating the system. One should also consider the lost opportunity costs and benefits. What other programs could have been initiated or expanded with the funds used to purchase the monitoring equipment? Finally, there are

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[1]Such systems are offered by Advanced Signal Concepts, Contrac, Control Data Corporation, Computrac, Corrections Services, Inc., and Controlec, Inc.

[2]Digital Products, Inc. offers such a system.

[3]The tests are being conducted by the Law Enforcement Standards Laboratory, National Bureau of Standards. The results will be made available by the National Institute of Justice.

nonmonetary costs and benefits to be considered.

Probably the primary selling point of the technology is the potential cost savings involved in the operation of institutions and new construction. The institutional overcrowding problem has made policy makers keenly aware of the extraordinary costs associated with incarceration. Operating costs vary, but recent studies suggest that they may well range between $15 and $50 per day. Similarly, the cost of new construction varies from $25,000 to $75,000 or more per bed depending upon the level of architectural security desired (Funke 1985).

From this perspective, there is no question that the direct cost of electronically monitoring offenders in the community is cheaper than incarceration. Although costs vary among vendors and also as a function of the number of units purchased, the current direct cost of a system might range up to $15 a day or more for each probationer. This represents an attractive cost tradeoff for policy makers who can see savings not only in institutional operating costs but also in the reduced need for future capital construction.

From the legislator's point of view, the technology represents a tempting cost savings if the public's demand for punishment and public safety can be set aside for the moment. However, from the probation administrators' point of view, the technology may not be cost beneficial. Relatively speaking, public expenditures for the administration of justice are a zero sum game. Funds expended for one purpose are no longer available for another. When a probation department considers the use of electronic monitoring, it should carefully consider the lost opportunity costs in terms of the benefits that might be derived from other programs. If a department is successful in securing funds to buy a monitoring system, will this frustrate efforts to secure needed funds to expand other programs or initiate new ones? Careful consideration should be given to how the technology will be used in the overall supervisory strategy of the department. Probation administrators need to properly assess the priority to be attached to electronic monitoring relative to other departmental needs. If the need for additional officers or higher salaries is more important, then care should be exercised to ensure that purchase of the technology will not inadvertently frustrate these ends.

Most of the administrators surveyed agreed that the technology should only be used to divert offenders who would be otherwise incarcerated. If the technology is simply used with individuals who would be granted probation anyway, there is no cost savings relative to institutional costs. Unless it is demonstrated that the use of the technology with typical probationers reduces recidivism more than conventional supervisory strategies, there would be no savings from a public safety perspective. Along this same line, it is likely that if the technology is only used to enhance surveillance of people who should be granted probation in the first instance, the result may be just a widening of the correctional net, increasing costs with no noticeable benefit.

An empirical question yet to be answered is whether the technology has a greater effect on recidivism than do conventional modes of supervision. If the technology is only used to divert offenders who would otherwise be incarcerated, one might reasonably expect under the best of circumstances a higher recidivism rate than is typical with those who would normally be granted probation. However, the potential cost savings from the technology declines rapidly as the recidivism rate of this higher risk group increases. If recidivism is high, then the costs associated with incarceration have simply been forestalled, not eliminated. In fact, one could argue, depending upon the rate of recidivism and the effects of inflation on the future costs of incarceration, that the use of the technology to divert and forestall incarceration will result in higher net future costs than would the initial incarceration of these offenders.

There are a variety of potential monetary benefits which could flow from the use of the technology. Obviously money saved by diverting offenders can be used in other ways. However, the nonmonetary benefits that might flow from the technology are equally attractive. One cannot deny the humanistic benefits which might be achieved. The decisionmaking criteria used in the administration of justice are generally conservative for understandable reasons. When the risks associated with diversion seem high, the system is more likely to incarcerate the individual than provide supervision in the community. In such instances, the secondary effects of incarceration are neither few nor trivial. Pretrial detainees, for instance, who are unable to make bond or be released on their own recognizance, may lose their jobs, apartments, default on their car payments, and not be in a position to support their families. In this case, policy makers must weigh the secondary effects of incarceration against the magnitude of the risk to public safety and failure to appear rate. Although the actual calculation of such tradeoffs is complex, the cost-benefit issue is simple: It is neither humanistically nor economically beneficial to hold people in prison or jail who do not need to be there (Nagel, Wice, and Neef 1977).

There may be a public image benefit to be derived from the use of the technology. Many citizens believe that being granted probation is simply "getting off," merely a slap on the wrist. For the most part this attitude emanates from the public's misconception of the role played by probation in the criminal justice system. Nevertheless, the attitude may be pervasive in a particular community, and the use of electronic monitoring may help to enhance the

public safety image of the department. Such a benefit is worth considering, since community acceptance of the legitimacy of probation is likely to increase its efficacy.

Advocates of electronic monitoring argue that the technology has the potential to reduce jail and prison populations. If successful, depending upon local conditions, this could have one of three effects. First, it could reduce the rate of capital expansion in the future. Secondly, it could obviate the need for new construction. Thirdly, it could actually reduce the population in existing facilities. Critics of the technology express skepticism about the third alleged benefit. They suggest that even if offenders were diverted from existing institutions, thereby making bed space available, the beds would be filled anyway. The result would not be a reduction in operating costs; on the contrary, it would simply increase overall public expenditures by the cost associated with the purchase of the technology. This school of thought reflects the belief that incarceration rates are determined by available bed space. The debate over the causal relationship between available bed space and institutional populations is a complex one which cannot be addressed here. Suffice it to say, however, that it is an issue which ought to be considered by policy makers in evaluating the costs-benefit tradeoffs associated with the use of electronic monitoring (Conrad and Rector 1977).

Regardless of who benefits from the technology, someone will have to pay for it, likely the taxpayer. Some suggest, however, that the probationer defray the cost, since she or he is a principal beneficiary of diversion. Initially this may seem to be an attractive alternative, but it raises a variety of concerns. Will such a policy discriminate against the indigent offender and raise equal protection issues? What portion of the cost can probationers be reasonably expected to pay? Is the option even realistic considering that probationers in many jurisdictions are already paying court costs, fines, restitution, and/or probation fees?

A final thought on cost-benefit concerns the research and development costs associated with the technology. If the proposed benefits are to be realized by the correctional community and the public, then the cost of the technology must be reasonable, the equipment reliable, operation efficient, training requirements minimal, and noticeable enhancements in public safety achieved. Currently, there are several companies offering electronic monitoring technology. In selecting among systems, the cautious consumer should keep in mind the adage "caveat emptor." Certainly the probation department does not want to become a guinea pig, paying for the research and development of an untested system. Prudent public policy requires that the private sector absorb the research and development costs prior to offering the technology to the correctional community. This suggests that the probation administrator should look not only at the comparative cost among the different systems currently in the marketplace, but also assess the extent and quality of the research and development which stands behind these products. Purchase of an unreliable system requiring a high degree of maintenance may prove to be an irrevocable mistake resulting in professional embarrassment and loss of public confidence.

Functional Considerations

In addition to cost, there are a number of functional considerations that the potential consumer should consider.

Several companies offer systems which require the probationer to wear a transmitter. Such devices can be worn around the neck, the waist, the wrist, or the ankle. Where the transmitter is worn may not only affect the reliability of transmission, but it may also raise cosmetic and safety concerns as well.

Transmitters worn on the ankle may not create a cosmetic problem for a man who wears trousers, but it could be a source of embarrassment for a woman who is accustomed to wearing a dress. One might counter that if the woman wants to get on the program, then she can wear pants. However, this doesn't seem to be a sufficient argument. The purpose of the technology is to divert offenders without jeopardizing public safety, not to brand the probationer with an electronic scarlet letter.

Devices worn around the neck or wrist may create problems for probationers involved in specific kinds of work or recreational activities. For instance, probationers working with certain machinery may be required to remove articles from their fingers, wrists, and from around their necks for safety reasons. Such restrictions may emanate from company policy, occupational safety laws, or the requirements of insurance underwriters. Although not a major problem, it may be an issue with some offenders admitted to the program.

If the probationer takes the transmitter off and leaves it next to the telephone while going out for a night on the town, the system is clearly jeopardized. Therefore, in comparing different systems, the consumer may want tamper-proof devices. Specifically, such a system is designed to sense whether the transmitter has been removed or tampered with. While a tamper-proof transmitter is a security benefit, it may also increase cost in two ways. First, the direct cost of such a device may be more than one which is not tamper-proof. Secondly, in making the device tamper-proof, it may not be reusable, depending upon the design of the particular manufacturer. If removal of the device makes it inoperant, then it may not be reusable when the probationer completes his term of surveillance. This may be an im-

portant cost consideration, depending upon how the department proposes to use the technology. If the department only intends to put probationers on the system for a short period of time (e.g., 30 or 60 days), then reusability becomes an important cost consideration. On the other hand, if probationers will be under surveillance for long periods of time, then reusability may not be as important; however, the number of units that will have to be purchased will be larger, driving up cost.

Some consideration should be given to the source of electricity used to energize the system. Typically the transmitter is powered by batteries, while the receiver and the computer use a conventional electrical outlet. Because of the dependency on electricity, power surges may jeopardize the system. A power outage may cause the computer to crash, temporarily eliminating its capacity to monitor probationers. Similarly, a power failure in the probationer's home or neighborhood will shut off the receiver, again jeopardizing the system. Several companies offer a receiver with a battery backup which permits continuing monitoring during a power failure. This is a desirable feature, particularly in areas subject to frequent power failures.

The transmitter worn by the probationer is powered by batteries which have a limited life. If the batteries fail, no signal will be sent to the receiver, and the computer will register a curfew violation. Therefore, consumers should look for some feedback mechanism in the system which can indicate that the batteries are beginning to run down. This will decrease the cost and administrative complications that result from false alarms.

The systems available today use telephone lines to provide the communications link between the receiver and the monitoring computer. The quality of local telephone service and any factors which affect land-line communications will effect the system's reliability. As one user put it, "If your telephone lines are mush, the system's not for you." The wise consumer should confer with the local telephone company to determine the quality of line service, particularly in areas in which probationers are likely to reside. If the manufacturer's minimum requirements and the quality of local telephone service are a poor match, the technology may be a bad investment.

Line seizure capability is another feature to consider in purchasing a system. What happens, for instance, if the probationer is on the telephone at the time the receiver attempts to dial the computer? Systems that cannot directly access the computer while the phone is off the hook can be easily compromised. Security can be circumvented if the probationer simply takes the phone off the hook and goes out for the evening or if the probationer or one of the family inadvertently leave the phone off the hook.

Existing systems have not been on the market long enough to assess their durability. The monitoring computer and the receiver are probably less liable to wear and tear than the transmitter worn by the probationer. It may be, for instance, that transmitters worn on one part of the body may be more subject to wear than those worn elsewhere. Depending upon the nature of the work and/or recreational activity engaged in by the probationer, devices worn around the neck or wrist may be subject to much more wear than those worn around the ankle.

Early experience indicates that large metal objects, such as a furnace or home freezer, which come between the transmitter and receiver, may interrupt the transmission, thereby creating a false alarm. This could be a persistent problem for probationers living in mobile homes, which for the most part are constructed out of metal. In this case, the probationer's residential mobility could be severely curtailed. Along the same line, at least one user suspects that false alarms may occur when the probationer curls up when sleeping and the body is positioned between the transmitter and the receiver. This, of course, is difficult to confirm, but it does suggest that the wise consumer ought to examine the developmental tests conducted by the manufacturer to determine whether physical objects falling between the transmitter and the receiver interrupt the signal and jeopardize the system. Such information is important in training the probationer in the proper use of the system.

Finally, one should realize that the probationer must have a home and a phone to qualify for the program. While this seems obvious, the requirement may play havoc with the potential cost-benefits to be realized from the technology. For instance, one obvious use of electronic monitoring is to divert pretrial detainees from a crowded jail. However, if the reason they can't make bond or qualify for recognizance release is due to their indigency or lack of a permanent residence, they may not be able to qualify for electronic monitoring either. Similarly, some offenders who would otherwise be prison bound but who are good candidates for ISP and electronic monitoring may not qualify, since their indigency prevents them from finding an appropriate residence and or paying for telephone installation and service. While it's easy to dismiss this problem with the *quid pro quo,* "no home, no phone, no program," the circumstance of indigency may work against the cost-benefits to be achieved with the technology. This raises the question of whether the department should absorb the cost of telephone installation and service in deserving cases or whether this should be passed on to the probationer. Obviously, there is a point of diminishing returns in how much the probationer can contribute to the operation of the system and how far the department can go in under-

writing the indigency of the probationer.

Good Candidates for the Technology

There is a wide variety of correctional clients that might be good candidates for the technology. Before discussing the use of the technology with different offender groups, however, it seems appropriate to raise the issue of the purpose of the technology. Among the probation administrators surveyed, most agreed that its primary purpose should be to divert individuals who would be otherwise incarcerated, since the use of electronic surveillance with individuals who would normally be probated raises several issues. First, it defeats the primary cost-benefit of the technology. Secondly, there is no evidence to date that electronic surveillance of conventional probationers is any better than conventional approaches to supervision. Thirdly, the idea of indiscriminately "wiring up" offenders put on probation would probably only widen the surveillance net without noticeable benefit.

In addition to diversion, however, there are other reasons to employ the technology. If a department currently requires officers to telephone probationers under ISP to determine whether they are complying with their curfew, the technology has the benefit of freeing these officers to do other things. The technology can also serve as an additional increment in the continuum of correctional alternatives from simple probation to incarceration.

Thus, the ends to be served by the technology are broader than just diversion. It can be used to several good ends, and the wise consumer should look for a balancing of purposes.

Pretrial Diversion

Typically, most of a community's jail population is composed of pretrial detainees. As the jail population reaches capacity, policy makers are faced with the choice of either constructing additional space, or diverting some of the population, particularly pretrial detainees. If diversion is the policy of choice, then the first question concerns why these individuals did not make bond.

Typically, a plurality are indigent and simply cannot afford to make bond. However, some will be found who can afford the bond but would rather use their limited resources to retain an attorney. Others believe, and maybe correctly, that if they use their limited resources to make bond, the court will deny their request for a court-appointed lawyer on their claim of indigency.

The alternative in such cases is release on recognizance. Communities vary substantially in the stringency in their recognizance release criteria. Some communities have liberal policies and divert substantial numbers of pretrial detainees. Others have more conservative policies, while still others will only release individuals under conventional security bonds.

Electronic monitoring is not a panacea for the pretrial jail crowding problem. The use of the technology in communities which do not have a recognizance release program is probably a waste of money. Their approach to pretrial release is probably unnecessarily conservative in the first place, and the establishment of a recognizance release program would be a more cost beneficial solution.

By similar reasoning, communities with overly strict recognizance release criteria may not realize much benefit from the use of electronic monitoring. Such communities would be better advised to determine whether their criteria are overly cautious. It might be wise to first lower release standards and determine whether there is any appreciable effect on either public safety or the failure to appear rate. Lowering the recognizance criteria to the point that a noticeable difference appears on one or both criteria provides an empirical indication of the point at which electronic monitoring might be a cost beneficial alternative. The point is that electronic monitoring should not be used if conventional diversionary tactics which are less expensive work equally well.

Weekend Sentences

Weekend sentencing is a correctional alternative which combines the elements of punishment and deterrence with the economic benefit of leaving an individual in the community to work.

While this appears meritorious, weekend sentencing creates a variety of problems for the jail administrator. Typically, weekends are the busiest of times in the jail. The added responsibility of booking and releasing weekend prisoners simply increases the burden. Because of the added responsibility and the perception that weekend offenders do not represent a major threat to public safety, the jail administrator may subvert the process by booking such individuals at 11:59 p.m. on Saturday night and releasing them at 12:01 a.m. Sunday morning. This defeats the purpose of the sentence and decreases respect for the law. Another problem is that the weekend prisoner can be easily extorted and victimized by the jail's permanent residents. Inmates can force the weekend prisoner to do favors for them during the week or face retribution when they return the next weekend.

Electronic monitoring may be a cost-beneficial and productive alternative to weekend sentencing, particularly for persons convicted of drunk driving. It has at least three advantages. First, it may be cheaper. Secondly, it relieves the jail of additional administrative duties during its busiest time. Finally, it eliminates a source of potential extortion, which while undesirable is difficult to control.

Work Release

One of the earliest applications of electronic monitoring was as a complement to a county jail work release program.[4] It appears to be a very attractive application, since it is cost beneficial in two ways: prisoners can live in their homes vis-a-vis the jail and, by working, they can contribute to their own support and that of their families.

Under this application, prisoners would work for several weeks under a conventional work release program. They would leave the jail each morning and return to the institution at night. After a period of adaptation, they would be released from the institution under an electronic monitoring program and expected to work during the day and be in their homes during specified curfew hours. If the system reported a curfew violation, the offender would be returned to the institution and lose the privilege of participating in the program.

Intensive Supervision

Because of prison overcrowding, a number of states have instituted ISP programs to divert individuals who would otherwise be sentenced to prison. Typically, ISP caseloads are small, and the probation officer is expected to make weekly, or in some cases daily, contacts with the offender. For the most part, ISP probationers represent high risk cases and must be watched carefully if the department is to ensure public safety.

The technology could be very useful in an ISP program. If a department decides to use the technology with everyone put under ISP, then such action would free the probation officer from the time required to either physically or telephonically confirm that the probationer is complying with curfew restrictions. If using the technology with all ISP cases proved to be either unnecessary or cost prohibitive, then the department could use it selectively as an increment in the degree of control exercised in the program. For example, if an ISP probationer was found in violation of one or more of the conditions of probation, the technology could be imposed in lieu of revocation. Since the probationer has much to lose from revocation, the impact of the technology could be significant.

Juveniles

It has been suggested that the technology could be used with juveniles. Several of the administrators surveyed found this application abhorrent, suggesting that enough has been done already to criminalize the juvenile justice system. Others, however, suggested that the juvenile justice system does not respond strong enough or early enough to the deviancy of youngsters. One administrator speculated that short periods of electronic curfew imposed early enough in the career of a delinquent might be very beneficial, since such action would indicate that the system is prepared to respond immediately to deviant behavior. Common sense dictates, however, that if a community is already concerned over the criminalization of the juvenile justice process, it might be best to first use the technology with adults in the least risky category. As success is achieved, the technology could be extended to more serious adult offenders and if still successful, then experiments might be tried with juveniles.

Other Applications

Enough has been said to this point to suggest the wide range of potential applications of the technology. The use of the technology in conjunction with shock probation may permit judges to sentence more serious offenders to this alternative. It could also be used by prison and jail administrators in conjunction with educational or home furlough programs. An interesting, but as yet unexplored, possibility is the use of the technology for medical purposes. It is not uncommon, for instance, to find women in jail or prison who are pregnant. In such cases, the institution must make special arrangements to assure the physical well-being of both mother and child. Depending upon the level of risk involved, the woman could be released to her home or the home of a relative during the course of the pregnancy. This would not only be cost-beneficial, but would likely provide a more conducive atmosphere to foster the health and welfare of both mother and child. Other medical applications include diversion of persons with AIDS or other communicable diseases, those requiring long-term post-operative recovery, mentally ill or retarded offenders, generiatric offenders, or offenders with physical handicaps.

The above considerations suggest several conclusions. First, the technology has broad potential application in corrections. Secondly, it should be used primarily for diversion, since other applications may have the effect of widening the correctional net and offsetting the cost-benefit of the technology. Finally, the technology should only be used in lieu of alternatives which are either less effective in assuring public safety or more costly.

Administrative Considerations

Regardless of the perceived cost-benefits, the introduction of the technology may require administrative changes affecting personnel policy, revocation procedures, and relations with the external environment.

Twenty-Four Hour a Day Service

By its very nature, electronic monitoring is a 24-hour

[4] Palm Beach County Sheriff's Department.

a day service. The system has to be monitored, particularly during the evening hours and on weekends. Violations must be reported and responded to.

Prior to implementing a system, the department must carefully specify the procedures to be followed in the event that a curfew violation is reported. Several alternatives are possible. The monitor can simply call the probationer on the phone to determine whether a report is false. Alternatively, the monitor can record the alleged violation and forward the report to the probation officer, who would confront the probationer the next day. A third alternative is for the monitor to call the probation officer or a surveillance officer who would then proceed to the probationer's residence to determine whether the report is false. Obviously this is more costly and raises the prospect of potential personnel problems.

Unlike law enforcement agencies, probation departments vary in their perception of whether they are a 24-hour a day service or an 8 to 5 service. If the technology is to be effective, the department needs to respond rapidly to reported curfew violations. If conventional wisdom is to be believed, the benefit of the technology will be best realized if the department responds immediately to reported violations. Since these violations will occur most commonly during the evening hours and on weekends, a timely response necessitates that the department perceive itself as a 24-hour a day, 7-day a week service.

Departments which foster the perception that officers are on call 24 hours a day are not likely to encounter personnel problems in implementing response procedures. However, if the probation officers rigorously cling to an 8 to 5 mentality, personnel policies and employee attitudes will have to be modified, or the benefits of the technology will be lost. Morale problems may develop in such agencies if departmental policy requires that evening hour and weekend curfew violations be followed up immediately. Union contracts may either prohibit this or contain provisions that overtime compensation must be paid if the officer is contacted after five o'clock. Such provisions may defeat the cost-benefit of the technology.

Surveillance Officers vs. Probation Officers

Good probation officers may argue that they are too highly paid and skilled to be spending their evening hours and weekends checking curfew violations reported by a computer. They may be right, but it also can be argued that the technology provides an opportunity to free the officer to do that which she or he does best. The department could hire surveillance officers to actually follow up the curfew violations. Surveillance officers need not be as highly paid or trained as a probation officer, since their sole function would be to follow up reported violations.

Depending upon the number of probationers monitored, one surveillance officer could be assigned to each caseload or possibly to two or three caseloads. The actual number needed would depend upon the number of offenders on the system and the number of violations reported. Although it may appear at the time of implementation that the number of surveillance officers required is an open-ended question, it really is not. Obviously, if a large number of violations are reported, then a larger number of surveillance officers would be required. However, if reported violations are high, the wrong offenders are being put on the program in the first place. If screening procedures are effective, the number of reported violations should be low, in which case few surveillance officers will be needed. If the number of violations goes beyond a certain number, then the question is not how many surveillance officers to hire, but what is wrong with the screening procedures used to select offenders.

Action on False Alarms

Four kinds of events can occur under an electronic monitoring system:

- The system reports that the offender is home when she or he is.
- The system reports that the offender is not home when she or he is not.
- The system reports that the offender is home when she or he is not.
- The system reports that the offender is not home when he or he is.

The system is functioning reliably when the first two conditions exist. Under the first condition, no action is required. Under the second condition, a probation or surveillance officer is dispatched to confirm the violation and take appropriate action.

Under the third condition, nothing happens. The system "thinks" that the probationer is home when she or he is not. Although the technology is designed to avoid this type of error, it may occur. The frequency of occurrence is difficult to determine, since the department would not be aware of a violation unless the probationer were arrested during the period of the curfew. In all likelihood this type of error is rare.

It is the last condition which can be most vexing for the department. The system reports a violation, but—upon checking—none has occurred. This can be caused by power surges and electrical outages, telecommunication problems, metal objects being imposed between the transmitter and receiver, and so on.

Some users have experienced serious difficulty with this

problem during the early stages of implementation. The errors are frustrating, because they consume manpower needlessly and create doubt in the minds of both probation officers and probationers as to the reliability of the system. If the system cries wolf too often, officers are not likely to follow up on reported violations, and the integrity of the system will be eroded. Problems of this sort are best avoided by studious comparative shopping among the various systems being offered. The consumer is wise to check with other users of a particular system to determine their experience with false alarms.

Procedures and Training

To some extent, procedures and training may vary depending upon the particular system purchased. However, notwithstanding which system is purchased, procedures need to be developed and training instituted in a variety of areas.

It is recommended that the consumer design operating procedures and training programs prior to implementing the system. It would be counterproductive to purchase a system, place probationers under surveillance, and then, only as they gain experience, figure out what procedures and training would have been appropriate.

One of the first procedures to be considered is the screening criteria to be used in determining appropriate candidates. Different procedures may have to be established, depending upon whether the potential candidates will be pretrial or post-trial, juveniles or adults.

The probationer will require some training in the operation and maintenance of the equipment. A short orientation program should be instituted which explains the purpose of the technology, how it works, care and maintenance of the equipment, what to do if the equipment fails, and the department's policy in the event of a curfew violation.

Monitors will have to be hired and trained to operate the equipment. Procedures to be considered include how to enter, update, modify, and expunge information in the computer and what to do in the case of reported violations. An important training consideration is what to do if the system crashes, as in the case of a power outage or mechanical failure. Depending on the manufacturer, the monitor may have to be trained in backing up and recovering the information contained in the system in order to protect the data against a system failure.

An important consideration is system security. It is a general principle of computer security to administratively separate computer operators from those authorized to make changes in the system. It is recommended that one individual, possibly the supervisor of the electronic monitoring program, be empowered to authorize changes but be prevented from having physical access to the hardware. All changes would be made by the computer operator, and the system should produce a daily log of all changes and modifications. It would be the supervisor's responsibility to verify whether the changes made corresponded with those which were authorized. This check and balance should protect the system from inadvertent as well as unauthorized changes.

Finally, the department will need to develop procedures for probation and surveillance officers on what to do in the case of reported violations. Certainly discretion must be exercised in the case of a false alarm, since the reported violation could be a function of system error rather than a curfew violation. As with conventional probation, a curfew violation should not necessarily result in a revocation.

External Relations

Electronic monitoring does not operate in isolation from the rest of the criminal justice community. If the technology is used as a form of diversion, then the courts and the prosecutor must be involved in establishing policy. For instance, if it is used as a compliment to recognizance release, then the various judges in the community should be of one mind with respect to the criteria used for this application. If the technology is used to divert offenders from the state prison, then both judges and prosecutors must be involved in the development of appropriate screening procedures. It would be regrettable, for example, if the technology simply became a bargaining chip in plea negotiation, with the net result that the wrong people were diverted. Before purchasing the technology, the prospective probation department should conduct a thorough feasibility study involving not only people within the department, but also representatives from the various external agencies which will be affected by the technology. Without prior planning and establishing mutually agreed upon procedures for its use, the benefits to be gained by the technology may well be lost.

Duration of Surveillance

Too much of a good thing can be bad. Sentencing an offender to 1 or 2 months of electronic monitoring is probably not excessive. Five to 8 years clearly goes beyond the point of diminishing returns. Unfortunately, the technology is too new to determine the optimal duration of its use.

A typical application would require the probationer to be home during weekday evenings and on weekends. Common sense would suggest that there is an upward limit to how long a person can be housebound before they begin to suffer "cabin fever," or before the condition proves detrimental to family members. In searching for an optimal duration, several principles might be kept in mind. First, an offender who is so recalcitrant or

dangerous to the community that she or he needs to be kept under residential surveillance for an extended period of time probably should not be kept in the community in the first place. Secondly, if one of the justifications for community supervision is the rehabilitation and reintegration of the offender into the community, then long-term residential surveillance which separates the offender from the community is antithetical. The third guideline might be cost. Although the technology is cheaper than institutionalization, it is expensive relative to other forms of supervision. Therefore, it is more cost-beneficial to use a fixed resource for shorter periods of time with more individuals than for longer periods of time with fewer individuals. Lacking empirical evidence in this regard, users will have to develop a duration policy incrementally.

Privatization of Surveillance

Should a department interested in electronic monitoring consider entering into a contract for the monitoring service?

It is quite conceivable, for example, for private investors to purchase electronic monitoring systems and offer monitoring services on a contractual basis. This could be a cost-beneficial arrangement, since the department would not have to make a capital investment in the equipment, be concerned with maintenance, or be involved in the hiring, training, or supervision of the monitors.

While the care to be exercised in this situation would be no different than that in contracting for other services, there is one caveat to be offered in this particular situation. The probation department should determine whether the contractor has a proprietary interest in the particular monitoring system being used. It would probably be better if the contractor had no financial interest in the hardware. In the event the hardware is unreliable, for instance, the contractor would be more likely to change systems. However, a contractor with a proprietary interest in the hardware may well be willing to live with an undependable system as long as the probation department is willing to pay for the service. This would be unwise, particularly if the unreliability of the system reduced its integrity in the eyes of both probation officers and probationers.

Media Involvement

It was mentioned previously that the use of electronic monitoring might have the benefit of enhancing the crime control profile of the probation department. By the same token, public awareness of the use of the technology may arouse concerns about an Orwellian invasion of privacy. Public reaction will probably vary from one community to another, and departments should consider what impact this reaction will have. In one community it may be wise to seek media exposure for the program, since such publicity may foster better community relations and a better public sense of safety. On the other hand, the department may want to keep a low profile, lest offenders be stigmatized by wearing an electronic device. Judges, prosecutors, and other members of the criminal justice community should be consulted during the planning phase on how best to handle media relations when the technology is implemented.

Feasibility Study

From what has been said, the importance of conducting a feasibility study before purchasing the technology should be obvious. Whether electronic monitoring will prove to be a cost beneficial investment will depend upon community need, the degree to which diversion is necessary, current sentencing practices, the extent to which the department, the judiciary, prosecutors, and other representatives of the criminal justice community can agree upon standards and procedures, and so forth. The complexity of the technology, along with the administrative and policy issues it raises, underscore the importance of planning. Failure to plan can result in several negative consequences: the consumer may make a less informed decision in selecting among the various systems currently available, implementation of the program will be slower, selection of appropriate candidates for the program will be less systematic, there will likely be greater disparity in the discretion exercised by officers in dealing with false alarms and violations of the conditions of probation, and, finally, the probability of arousing the public's ire may be increased by misapplication of the technology.

Potential Abuses of the Technology

Electronic monitoring technology can be a useful tool in the repertoire of probation's supervisory strategies. By the same token, it can be abused.

As mentioned before, the primary use of the technology should be the diversion of individuals who would be otherwise sentenced to prison or jail. Even allowing for the conservative nature of decisionmaking in criminal justice, many of those currently incarcerated need the added surveillance that an institution allows. Thus, the diversion of these individuals will require more extensive surveillance in the community. Other things being equal, the use of electronic monitoring in this circumstance seems appropriate. Using the technology with individuals who would be granted probation anyway is potentially abusive. It has already been pointed out that this application is likely to raise costs without necessarily increasing benefits. In addition, it widens the correctional net needlessly and is an undue invasion of privacy. It is

not inconceivable that judges and prosecutors enamored with the technology could adopt the policy of including everyone under community supervision in an electronic monitoring program. This excessive use of the technology should be avoided. To reiterate a caveat mentioned above, the technology should not be used if other surveillance technologies which are less expensive and less intrusive work equally well.

Being diverted from prison or jail is a benefit to the probationer, but excessively long periods of house arrest may have adverse effects. Some might argue, for instance, that it would be cost beneficial to use electronic surveillance to hold people under house arrest for 24 hours a day, 7 days a week. If this condition were imposed for any length of time, it would be abusive in two ways. First, if the offender represented such a threat to the community that prolonged house arrest was necessary, she or he probably needs to be in an institution. Secondly, such protracted and continuous confinement is antithetical to the purposes of probation.

To a lesser extent, and for the same reasons, long-term partial confinement during weekday evenings and weekends can be abusive. Such a regimen of confinement may be reasonable for several months, but if an individual has demonstrated that she or he can work during the day and obey curfew restrictions in the evenings and on weekends, why continue such extensive monitoring? Would it not be better to reduce the level of supervision and use the equipment on some other probationer in need of more extensive supervision?

Some suggest that the technology represents an unwarranted invasion of privacy, and sooner or later litigation will ensue. While one should never rule out the possibility of litigation, the authors believe that if the monitoring program is voluntary and used appropriately, litigation is unlikely. Since offenders diverted to the program would have been incarcerated otherwise, they are not likely to sue, since prison is a less desirable alternative. In fact, electronic monitoring is a "bird nest on the ground" for defense attorneys looking for leverage in plea negotiation, and therein lies a potential abuse of technology. The busy prosecutor may become too willing to negotiate pleas resulting in probation with electronic monitoring, when the more appropriate sentence would be incarceration. For this reason it is critical to involve both the prosecutor and the courts in developing diversionary policy long before the purchase of a system. In the absence of a well conceived and mutually agreed upon diversion policy, it is easy to see how the technology could be misused in the plea negotiation process.

Some of the administrators interviewed expressed concerns that the technology could replace the probation officer. This certainly would be an abuse of the technology. If the primary purpose of the technology is to divert offenders from institutions, then by definition these offenders need more human contact than conventional probationers, not less. All the technology provides is an automated means of monitoring during curfew hours. It would certainly be an ill conceived policy which suggested that high risk offenders be released into the community with nothing more than electronic monitoring. If such offenders needed no more supervision than that, they probably should not be under such an intensive and costly form of supervision in the first place. The properly conceived use of the technology is not as a replacement for the probation officer, but as a tool which frees the officer to make better use of his or her time.

The technology should not be conceived of as a quick fix for the complicated problem of a community's overcrowded jail or a state's overcrowded prison system. Overcrowding is a complex problem, unlikely to be solved simply by purchasing an electronic monitoring system. A community or state facing overcrowding problems needs to conduct an indepth analysis of why the problem exists and identify various alternatives which can ameliorate the situation. Electronic monitoring might be a useful tool but certainly not the sole remedy for the problem. It cannot be used as a substitute for sound correctional policy development.

Although practical experience is limited, common sense suggests that certain kinds of offenders may be inappropriate candidates for electronic monitoring. Given current public sentiment about the treatment of sexual offenders, it may not be wise to include them in the early stages of a program. This is not to say that such individuals could not benefit from the program, rather that subsequent violations committed by sexual offenders under electronic monitoring may arouse such strong community reaction as to jeopardize the use of the technology with other suitable offenders. Common sense would also suggest that offenders with a history of spouse or child abuse are not suitable candidates. In this case, the use of the technology may put the offender's family in clear and imminent danger.

Finally, one needs to carefully consider the potential use of the technology with juveniles. Communities vary, both in the extent of delinquency and in their corresponding tolerance for the criminalization of the juvenile justice system. Other things being equal, the technology could be a very effective means of responding to early signs of delinquency. However, the danger always exists that the juvenile justice net will be widened too far and that the ill effects of labeling, attendant with an over reaction to deviance, could become excessive.

Philosophic Concerns

Inteviews with probation administrators suggested that

there is a wide range of philosophic attitudes toward the technology. On the one hand, some see it as a useful tool which could find a proper place in probation. Others see it as one step beyond what probation is supposed to be. Most administrators, however, expressed a philosophic ambivalence about the technology. They realized that probation must change with the times but were uncertain whether electronic monitoring was an appropriate change for probation. These administrators might be characterized as sitting on the fence. While mildly interested in the technology, they would rather let some other agency experiment with its use before taking the plunge themselves.

It may be that the differences in attitude found among the administrators surveyed emanate from divergent views as to the purpose of probation. Some see probation as primarily a surveillance function, and although they are not opposed to the ends of rehabilitation, they are not likely to take risks when asked to choose between these two objectives. In all likelihood, administrators who hold this view will come more readily to the use of electronic monitoring technology.

Other administrators approach probation from a more humanistic perspective. While they do not discount their responsibility to assure public safety, they give relatively more emphasis to the rehabilitative goals of probation. These administrators are more sensitive to the Orwellian connotations of the technology and view it as one step beyond the appropriate function of probation. They might characterize the philosophy of probation in the following way. Offenders make mistakes, but some have enough going for themselves that society can take a chance on letting them remain in the community. The purpose of probation, therefore, is to allow offenders to demonstrate that they are trustworthy enough to live among their fellow citizens. While some degree of human surveillance is prudent, the probationer must be given enough room to demonstrate trustworthiness. Given this philosophic point of view, some administrators feel that electronic monitoring goes beyond trust and therefore beyond the scope of what probation should be.

Summary

It should be clear that the prospect of using electronic monitoring in probation raises a variety of concerns. From the narrow perspective of direct cost, the technology is cheaper than the operational or new construction costs associated with institutions. But the cost-benefit tradeoffs become more murky when indirect costs and benefits are assessed and the lost opportunity costs are factored in. While it may be a helpful technology for the manager of an overcrowded institution, it may be less cost beneficial to the probation administrator with other pressing needs. Careful reflection indicates that the technology cannot solve the overcrowding problem, nor can it be used as a substitute for long-term correctional policy development. At best, it can be used in conjunction with other alternatives to help resolve the overcrowding problem.

The introduction of the technology into a probation department will necessitate various administrative and organizational changes. The department will be put on a 24-hour a day footing, which may be contrary to its current personnel practices, history, and traditions. New personnel may have to be employed. New procedures will have to be instituted to screen candidates for the program, to determine the appropriate length of time that probationers should be under surveillance, and to direct decisionmaking in cases of false alarms and curfew violations. The technology should be used primarily for diversion, not as a substitute for or as an addition to, conventional supervisory practices which work equally well.

Finally, it should be said that the technology is probably not appropriate for every department. The utility of the technology must be weighed against other pressing needs. Departments which have already established proven conventional supervisory strategies may find that the technology offers little. The ultimate empirical question is whether the technology reduces risk to the public or enhances the opportunity for rehabilitation any better than conventional supervisory strategies which cost less.

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Complex Policy Choices: The Pennsylvania Commission on Sentencing

BY JOHN H. KRAMER AND ANTHONY J. SCIRICA*

IN 1982, the Pennsylvania legislature adopted sentencing guidelines submitted by the Pennsylvania Commission on Sentencing. This adoption culminated over 3 years of work by the Commission. A year earlier the legislature had rejected a set of guidelines submitted to it by the Commission on the basis that those guidelines were too constraining on the judiciary and too lenient. The Commission revised those initial guidelines as directed by the legislature and resubmitted them for legislative consideration. It was these guidelines that were adopted by the legislature. As a result of the legislative direction to increase the severity and to provide the judiciary more latitude under the guidelines, the guidelines reflect Commission decisionmaking and legislative direction.

A sentencing commission must make many difficult decisions in writing sentencing guidelines. The following discussion describes the most significant of these decisions and presents the rationale supporting them. As with any body, a commission decision does not always reflect unanimous agreement. Often decisions were made, reconsidered, modified, and made again.

Creation of the Commission

In 1978, the Pennsylvania legislature created the 11-member Pennsylvania Commission on Sentencing. The Commission membership is composed of four members of the legislature, four judges, and three gubernatorial appointments which must include a defense attorney, a district attorney, and a law professor or criminologist. The Commission was mandated to submit to the legislature a set of sentencing guidelines that incorporated the gravity of the current offense, prior felony convictions, and use of a deadly weapon. Moreover, the legislation mandated ranges for aggravating and mitigating circumstances. However, there were also other aspects of law which established important contexts for the drafting of sentencing guidelines. The Judicial Code of Pennsylvania [42 Pa. C.S. §9721(b)] retains an eclectic approach to sentencing by stating that sentencing decisions should call for "confinement that is consistent with the protection of the public" (incapacitation, rehabilitation, and/or deterrence); "the gravity of the offense" (retribution); and "the rehabilitative needs of the defendant" (rehabilitation).

In addition, the enabling legislation [42 Pa. C.S. §9781(d)] specified that, under appeal, the appellate courts shall consider the sentencing court's opportunity to review the nature and circumstances of the offense, the history and characteristics of the defendant, and the opportunity of the sentencing court to observe the defendant and the sentencing guidelines.

Thus, Pennsylvania grafted the sentencing commission model onto its individualized, indeterminate sentencing model. Statute maintains that the parole board make release decisions.

The legislature also extended the right of appellate review of the discretionary aspects of sentencing to the prosecutor and specified that the standards on appeal are "clearly unreasonable" if the sentence is within the guidelines [42 Pa. C.S. §9781(c)(2)] and "unreasonable" when the cout departs from the guidelines [42 Pa. C.S. §9781(c)(3)].

Pennsylvania's Decisionmaking Process

The problem before the Pennsylvania Commission on Sentencing was to draft sentencing guidelines that recognized the individualized model of sentencing, yet provided the court with standards that would reduce unwarranted sentencing disparity. As with any policy decisions, the Commission's decisions represent value choices. In making these choices, it established important and basic principles that guided the decisionmaking.

Descriptive vs. Prescriptive Guidelines

The most important decision that the Commission had to make was whether its guidelines would be descriptive or prescriptive. Descriptive guidelines focus on reducing disparity by establishing a norm which is based on past sentencing practices. Such guideline development is statistical in nature and assumes that current sentencing practices are generally appropriate. The basic purpose of descriptive guidelines is to bring extremely disparate sentences into line with the sentencing practices of most of the judiciary. Prescriptive guidelines, the alternative model, are not statistically derived from past practice but

*John H. Kramer is executive director of the Pennsylvania Commission on Sentencing. Anthony J. Scirica is a U.S. District Court judge in the Eastern District of Pennsylvania.

are set based on the informed judgments of those writing the guidelines.

The Pennsylvania Commission's debate on which approach to adopt centered on the value assumptions inherent in descriptive guidelines. First, the Commission was unwilling to assume that average sentences represented correct sentences. In fact, it was pointed out in this debate that the average sentence may not be one which is frequently given, but merely a statistical compromise between extremes.

Commissioners also attacked statistical determination of the factors to be considered at sentencing and the relative weight of these factors. They argued that the legislative mandate prescribed inclusion of certain factors such as gravity of the offense and prior felony convictions. They further argued that fairness dictated that certain factors which might have been used by courts in the past should not be considered in sentencing.

Furthermore, the Commission viewed its creation as indicative that the problems in sentencing were not limited to the issue of disparity. It concluded that a descriptive approach would ignore the broader problems of sentencing which the Commission must address.

With the decision to adopt the principle to write prescriptive guidelines, the Commission moved forward with its decision as to the factors that should be considered in sentencing and how they should be incorporated into the guidelines. At the same time, the Commission undertook a major research effort on sentencing practices. But the purpose of this research was to provide information on sentencing practices and on the potential impact of the guidelines on prison populations, not to establish guideline standards.

Benchmark Approach

A second major Commission decision was the adoption of the principle that guidelines are benchmarks. The Commission adopted the benchmark concept to reflect not only its own philosophy but the philosophy inherent in the Commission's enabling legislation.

As noted above, the Commission's enabling legislation adopted an eclectic, multipurpose approach to sentencing. This approach specified that issues and factors related to the utilitarian purposes of sentencing such as rehabilitation, deterrence, and incapacitation, as well as retribution, were important considerations in sentencing decisions.

The policy implicit in these mandates is that the guidelines must be considered by the court, but the court's responsibility extends beyond consideration of the guidelines.

Besides the legislative mandate, the Commission viewed the benchmark concept as reflective of its philosophy that guidelines are advisory rather than presumptive. The basic principle behind the Commission's view was that guidelines should assist—not replace—the court. In fact, the guidelines were seen as increasing fairness only if the court cautiously applied the guidelines as opposed to accepting ritualistically the guidelines' recommendation. For example, as will be noted later in this article, the Commission determined that guidelines should reflect factors to be considered by the court in every sentencing event. Other factors which might be important and appropriate to consider are left to the court's discretion.

Another issue that led to the Commission's view of the guidelines as benchmarks was its view that guidelines are a simplification of a complex event. The Commission believed that ritualist application of the guidelines would result in a form of disparity in which dissimilar offenders are treated similarly.

Offense Gravity Score

The statutory mandate required that the Commission include in the guidelines the gravity of the current offense. In order to develop the offense gravity score, the Commission established a subcommittee to determine the most appropriate way to measure this variable and to propose to the Commission a set of rankings for its consideration. It must be noted that the process was time consuming and difficult. The subcommittee considered several different mechanisms to arrive at the offense rankings and determined that the best means was to look at each crime and rank it on a 10-point scale. One alternative for the subcommittee was to adopt Pennsylvania's statutory six-rank grading system. However, statutory grading was rejected because statute defines crimes very broadly and sets statutory maximums intended for the worst cases.

The result of this process was that all crimes were assigned a score from 1 (least serious) to 10 (most serious). The subcommittee developed a statement of rationale for the rankings based on staff observations of its decision-making process. The major rationales used in ranking offenses were the physical injury or potential physical injury to the victim, the harm or potential harm to the victim or the community, the statutory classification of the offense, and the culpability of the offender. These rationales were then reviewed and adopted by the Commission.

By establishing a rationale for offense rankings, the Commission was able to review its rankings and locate inconsistencies with the adopted principles. In addition, the rationales highlighted the fact that certain offenses were too broadly defined. For example, under certain circumstances, an offense would fall under one rationale, and under other circumstances, the offense would fall under another rationale and thus have a different ranking. As a consequence of this observation, the Commis-

sion determined to subdivide certain crimes such that the offense ranking would vary depending on the circumstances of the offense. The best example of this is the crime of burglary. Under Pennsylvania statute, burglary encompasses all forms of breaking and entering. Thus, such factors as type of structure, occupancy, and time of day are not distinguished in the statute.

The Commission decided that to classify all burglaries as equal would lead to inequitable sentencing results because all burglaries are not equal in terms of the potential injury or harm to the victim. Therefore, the Commission took the single statutory offense of burglary and created four subcategories and ranked these subcategories.

OFFENSE RANKING	OFFENSE DESCRIPTION
7	Burglary of an occupied structure adapted for overnight accommodation
6	Burglary of an unoccupied structure adapted for overnight accommodation
6	Burglary of an occupied structure not adapted for overnight accommodation
5	Burglary of an unoccupied structure not adapted for overnight accommodation.

Thus, one statutory offense became four different behaviors for purposes of ranking under the sentencing guidelines. This aspect of the guidelines was necessary in order to reduce the problem of treating very different criminal behaviors equally.

To further reflect its focus on victim injury, or potential injury and culpability of the offender, the Commission adopted a deadly weapon enhancement to guideline recommendations in instances in which a deadly weapon is possessed in the commission of the crime and is not an element of the crime.

Criminal History

In developing the guidelines, the Commission had to determine what factors other than the severity of the current offense should be incorporated into the guidelines. The alternatives ranged from not including any factors other than current conviction to incorporating a wide range of factors such as prior convictions, prior arrests, prior juvenile adjudications, prior incarcerations, parole or probation status, educational level, employment status and history, as well as numerous other such factors.

A. Offender Characteristics

The Commission was mandated in the enabling legislation to consider prior felony convictions. However, Commission debate centered on whether offender characteristics such as employment status and history and educational level should be incorporated into the guidelines as well.

There were two major arguments against their inclusion. One argument was that such factors are racially biased. Those taking this position argued that defendants who have less education and who are unemployed would be discriminated against and that such discrimination would work to the disadvantage of racial minorities.

A second argument was that status factors may be appropriate under some circumstances and inappropriate under other circumstances. Those taking this position argued that employment might be an important factor for a judge to consider in reaching the decision whether someone should be incarcerated. For example, if the imposition of a short incarceration sentence would result in the loss of an individual's job, then employment status might be appropriate to consider in sentencing. On the other hand, if the current offense was serious and the sentence recommendation was a relatively long period of confinement, then the individual's employment status was seen as being irrelevant.

Those who argued for the limited inclusion of status factors did so on the basis of two major arguments. First, it was argued that employed, incarcerated individuals are punished more severely than those unemployed because they suffer incarceration as well as the loss of job and perhaps support for dependents. A second argument rested on the ability of employment and educational level to predict recidivism. This argument was rebutted by arguments that status factors had not proven predictive of recidivism.

The Commission decided not to incorporate defendants' education and employment history in the guidelines but to leave such factors for the court to use as a reason for aggravating or mitigating the sentence.

B. Juvenile Record

A second major issue was whether to include prior juvenile court adjudications in the guidelines and, if included, what role they should play. The Commission established that juvenile adjudications should be considered in the guidelines because they often reflect serious misconduct on the part of the defendant, and, as such,

they reflect the offender's culpability and commitment to crime.

Those opposed to including adjudications made two arguments. One argument focused on the legal standards in juvenile court. This argument cautioned that in juvenile court, the standard of proof is often less than "beyond a reasonable doubt" and, therefore, should not be included in the guidelines. A second issue focused on the fact that many juvenile court judges do not set forth on the record the reason for a finding of delinquency. This argument noted that a juvenile may be brought to court under a delinquency position citing numerous allegations. However, when the court issues its findings of delinquency, it often does not specify for the record the particular charges for which the juvenile is guilty.

Although these concerns did not convince a majority of the commissioners, the latter argument did lead to the limitation that juvenile adjudications be counted in computing the guidelines only when the reason for the adjudication of delinquency is placed on the record. The Commission also limited the use of juvenile adjudications to offenses committed after the offender's 14th birthday, and statute limited their consideration to only when the current offense is a felony.

C. Current Correctional Status

Many guideline systems incorporate whether the defendant is on probation or parole at the time of the current offense as a factor to enhance the guideline recommendation. The Commission determined that such factors are inappropriate to consider in the guidelines because offenders on probation and parole are subject to revocation of their parole or probation status and punishment for the violation. Therefore, to enhance the guideline recommendation for such status would be to sanction the offender twice for the same behavior.

D. Prior Record Score

In calculating the prior record, the Commission thought it important to weigh the record according to both the seriousness and frequency of prior convictions. Therefore, the Commission established a four-level measure of prior record seriousness. The most serious offenses such as murder, rape, and kidnapping count three points each in the prior record score. Other felonies count either one or two points each depending on their seriousness; and misdemeanors, which can be punished by up to 5 years, are severely limited in their role in the guidelines.

The role of prior convictions/adjudications in the guidelines was always intended to be of secondary importance to the severity of the current conviction. However, after the rejection of the initial guidelines by the legislature, the Commission increased the role of prior convictions/adjudications. Thus, although offense severity is still the major element in the guidelines, the importance of prior record has increased over time.

Sentence Lengths

Once the Commission established the basic matrix, consisting of the offense gravity rankings and the prior record measure, it had to address the issue of setting sentence lengths. Before beginning this process, however, the Commission had to determine whether the guidelines should be constrained by prison capacity.

A. Capacity Cap

The decision whether prison/jail capacity should limit the guideline recommendations was a major Commission decision. The enabling legislation for the Minnesota Sentencing Guidelines Commission specified that it must consider the impact of its guidelines on prisons. No such directive was in the Pennsylvania enabling legislation; however, the Commission recognized the importance of the issue.

The Commission thought that stable and fair sentencing policies were the reasons the Commission was established. Therefore, the Commission set as its priority that prison population should be dependent on fair sentencing practices and not the driving force for sentencing decisions. The Commission trusted that once guidelines were implemented, prison populations would stabilize and careful planning for correctional resources could take place.

B. Setting Minimum Sentence

Since Pennsylvania statute requires that the court set a minimum and maximum sentence, the Commission discussed whether it should set guidelines for the minimum sentence, the maximum sentence, or both. The Commission determined to set guidelines for the minimum sentence because the minimum sentence establishes the parole eligibility date in Pennsylvania when the maximum sentence is 2 years or longer.

Furthermore, parole board records available when the guidelines were being written indicated that in excess of 80 percent of the offenders were released at the expiration of the minimum. Consequently, the Commission was confident that the minimum sentence set a relative predictive and certain release date. Regarding the setting of the maximum, the Commission decided to let the court fashion the maximum to the individual case, although it knew that practice generally placed the maximum at twice the minimum.

C. Setting Lengths

The seting of guideline sentences began with the Commission reviewing the guideline matrix and considering past judicial practices for each cell of the matrix. The data showed the percentage of offenders incarcerated in each cell and the average minimum sentence. Based on this data, the Commission was able to see where sentencing practices indicated that incarceration was appropriate, and the data provided the Commission a sense of the sentence lengths offenders were receiving. Since the Commission was writing prescriptive guidelines, the data were used to inform the Commission rather than dictate sentencing recommendations.

In the first set of guidelines submitted to the legislature, the Commission constructed a matrix consisting of three basic sections. For the most serious offenders, the guidelines established sentencing standards which called for relatively long periods of confinement to a state institution. In the middle section of the matrix the Commission set guideline ranges that recommended incarceration in a county facility. The third section of the matrix established guideline sentences recommending nonconfinement.

The initial lengths set by the Commission were graduated so as to systematically increase with increases in offense gravity and prior record. These sentence lengths were established so as to place greater emphasis on the conviction offense than on the prior convictions of the defendant.

The initial guidelines incorporating these sentences were rejected by the legislature. The legislative resolution rejecting the guidelines called on the Commission to increase judicial discretion under the guidelines and to increase the severity of the guideline sentences. The Commission revised the guidelines as mandated. It widened ranges in the guideline matrix by increasing the upper limit in each cell of the matrix and replaced the recommendations calling for nonconfinement with ranges allowing confinement at the court's discretion.

The guidelines as adopted by the legislature establish sentences proportionate to the severity of the current conviction offense and the severity and frequency of prior convictions. The guidelines recommend more certain and longer sentences of confinement for violent offenders than had past sentencing practices. For offenders convicted of major property crimes, the Commission's guidelines establish recommendations of more certain confinement than had past sentencing practices and of much shorter lengths of confinement than those for the violent offender. For the least serious offenses, generally misdemeanors, the guidelines leave the incarceration decision to the court and only broadly set guidelines on the length of incarceration. (See Appendix A which is a sentence range chart.)

Appellate Review

Although most attention has been focused on the guidelines, the right of appellate review may be more important. For years, sentencing was virtually not reviewable. With the implementation of the sentencing guidelines, Pennsylvania has instituted comprehensive appellate review of sentences. Appellate review requires careful consideration and articulation of the reasons for the sentence, which are important to the victim, the defendant, and the public.

Prior to statutory appellate review in Pennsylvania, a sentence was reviewable only if the sentence were illegal or manifestly excessive. Now the discretionary aspects of the sentence may be appealed, and the standard of review is the reasonableness of the sentence. Both the defendant and the district attorney have the right to appeal a sentence.

In the standard of appellate review the guidelines carry a presumption, and the appellate court is directed to look more closely to sentences that fall outside the guidelines. If the sentence is within the guidelines, the appellate court shall affirm unless the sentence is clearly unreasonable. On the other hand, if the sentence is outside the guidelines, the court shall affirm unless the sentence is unreasonable. The standard, however, is not whether the sentence complies with the guidelines, but whether it is a just and reasonable sentence. The guidelines are only one of four factors, including the nature of the offense and the history and characteristics of the offender, that the appellate court must consider.

In the last few years the appellate court has upheld the district attorney's right to appeal and strongly endorsed appellate review of sentences and the concept of sentencing guidelines to reduce unwarranted disparity. As a consequence, Pennsylvania is receiving thoughtful analyses of sentences, and a common law of sentencing is developing. In the end, it may be that the most important decisions will not be made by the sentencing commission but by the appellate court reviewing the individual decisions of the sentencing judge.

Conclusion

The Pennsylvania Commission on Sentencing confronted numerous difficult choices in drafting sentencing guidelines. This article has reviewed the most important choices, choices which are likely to stir much debate. The sentencing reform movement has progressed quickly over the past decade, almost too quickly for extensive debate on the many issues that must be decided. What seems obvious and rational from one perspective may

seem irrational from another.

The Commission adopted several principles in writing its guidelines, establishing that the Commission should prescribe sentencing standards, not establish standards based on statistical analysis of past practices. It set guideline sentences proportionate to the severity of the current conviction offense and the frequency and seriousness of prior convictions. Finally, the Commission identified its guidelines as benchmarks to reflect its view that guidelines should establish a fair beginning point of reference for the court.

These principles represent one sentencing commission's approach to developing sentencing policy. The guidelines derived from these principles have reduced sentencing disparity and have changed sentencing patterns (Kramer and Lubitz, 1985). Moreover, the appellate court's have carefully and thoughtfully reviewed sentences under appeal, and a significant body of case law on the application of the guidelines is evolving (McCloskey, 1985). The Commission is optimistic that through its continuous review and monitoring of the guidelines and strong support from the appellate court, even better guidelines will evolve in the future.

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Pennsylvania Bulletin, State of Pennsylvania, Vol. 12, No. 4, Saturday, January 23, 1982.

APPENDIX A

Offense Gravity Score	Prior Record Score	Minimum Range*	Aggravated Minimum Range*	Mitigated Minimum Range*
10 Third Degree Murder**	0	48-120	Statutory Limit***	36-48
	1	54-120	Statutory Limit***	40-54
	2	60-120	Statutory Limit***	45-60
	3	72-120	Statutory Limit***	54-72
	4	84-120	Statutory Limit***	63-84
	5	96-120	Statutory Limit***	72-96
	6	102-120	Statutory Limit***	76-102
9 For example: Rape; Robbery inflicting serious bodily injury**	0	36-60	60-75	27-36
	1	42-66	66-82	31-42
	2	48-72	72-90	36-48
	3	54-78	78-97	40-54
	4	66-84	84-105	49-66
	5	72-90	90-112	54-72
	6	78-102	102-120	58-78
8 For example: Kidnapping; Arson (Felony I); Voluntary Manslaughter**	0	24-48	48-60	18-24
	1	30-54	54-68	22-30
	2	36-60	60-75	27-36
	3	42-66	66-82	32-42
	4	54-72	72-90	40-54
	5	60-78	78-98	45-60
	6	66-90	90-112	50-66
7 For example: Aggravated Assault causing serious bodily injury; Robbery threatening serious bodily injury**	0	8-12	12-18	4-8
	1	12-29	29-36	9-12
	2	17-34	34-42	12-17
	3	22-39	39-49	16-22
	4	33-49	49-61	25-33
	5	38-54	54-68	28-38
	6	43-64	64-80	32-43
6 For example: Robbery inflicting bodily injury; Theft by extortion (Felony III)**	0	4-12	12-18	2-4
	1	6-12	12-18	3-6
	2	8-12	12-18	4-8
	3	12-29	29-36	9-12
	4	23-34	34-42	17-23
	5	28-44	44-55	21-28
	6	33-49	49-61	25-33

Offense Gravity Score	Prior Record Score	Minimum Range*	Aggravated Minimum Range*	Mitigated Minimum Range*
5 For example: Criminal Mischief (Felony III); Theft by Unlawful Taking (Felony III); Theft by Receiving Stolen Property (Felony III); Bribery**	0	0-12	12-18	nonconfinement
	1	3-12	12-18	1½-3
	2	5-12	12-18	2½-5
	3	8-12	12-18	4-8
	4	18-27	27-34	14-18
	5	21-30	30-38	16-21
	6	24-36	36-45	18-24
4 For example: Theft by receiving stolen property, less than $2000, by force or threat of force, or in breach of fiduciary obligation**	0	0-12	12-18	nonconfinement
	1	0-12	12-18	nonconfinement
	2	0-12	12-18	nonconfinement
	3	5-12	12-18	2½-5
	4	8-12	12-18	4-8
	5	18-27	27-34	14-18
	6	21-30	30-38	16-21
3 Most Misdemeanor I's**	0	0-12	12-18	nonconfinement
	1	0-12	12-18	nonconfinement
	2	0-12	12-18	nonconfinement
	3	0-12	12-18	nonconfinement
	4	3-12	12-18	1½-3
	5	5-12	12-18	2½-5
	6	8-12	12-18	4-8
2 Most Misdemeanor II's**	0	0-12	Statutory Limit***	nonconfinement
	1	0-12	Statutory Limit***	nonconfinement
	2	0-12	Statutory Limit***	nonconfinement
	3	0-12	Statutory Limit***	nonconfinement
	4	0-12	Statutory Limit***	nonconfinement
	5	2-12	Statutory Limit***	1-2
	6	5-12	Statutory Limit***	2½-5
1 Most Misdemeanor III's**	0	0-6	Statutory Limit***	nonconfinement
	1	0-6	Statutory Limit***	nonconfinement
	2	0-6	Statutory Limit***	nonconfinement
	3	0-6	Statutory Limit***	nonconfinement
	4	0-6	Statutory Limit***	nonconfinement
	5	0-6	Statutory Limit***	nonconfinement
	6	0-6	Statutory Limit***	nonconfinement

*Weapon enhancement: At least 12 months and up to 24 months confinement must be added to the above lengths when a deadly weapon was used in the crime.
**These offenses are listed here for illustrative purposes only. Offense scores are given in §303.7.
***Statutory limit is defined as the longest minimum sentence permitted by law.

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Privatization of Corrections: Defining the Issues*

BY IRA P. ROBBINS

Professor of Law and Justice, The American University, Washington College of Law

EVEN AS the public is demanding that more criminals be incarcerated and that their sentences be lengthened, the problems of America's prisons and jails continue to plague, if not overwhelm, us. More than two-thirds of the states are currently under court order to correct conditions that violate the United States Constitution's prohibition against cruel and unusual punishment. There are many important questions, but there are still no clear, satisfactory answers.

The last few years have thus witnessed diverse, controversial developments. Some, like the voluntary accreditation of correctional facilities by the Commission on Accreditation for Corrections, have begun to take root. Others, like a 1982 proposal in Congress to build an Arctic penitentiary for serious offenders,[1] have been inconsequential. Yet the number of prisoners and the cost of housing them still mount. Prison and jail populations have doubled in a decade, and—with preventive detention, mandatory-minimum sentences, habitual-offender statutes, and the abolition of parole in some jurisdictions—there is no relief in sight. Some states are even leasing or purchasing space in other states. And it is costing the taxpayers approximately $17 million a day to operate the facilities, with estimates ranging up to $60 a day per inmate. Several commentators have not so facetiously noted that we could finance college educations at less cost for all of the inmates in the country.

To reduce some of this stress on the system, a new concept has emerged: the privatization of corrections, occasionally known as "prisons for profit." The idea is to remove the operation (and sometimes the ownership) of an institution from the local, state, or Federal government and turn it over to a private corporation.

At the outset, it should be emphasized that private prisons are different from the notion of private *industries* in prison—Chief Justice Burger's "factories with fences" proposal[2]—which seeks to turn prisoners into productive members of society by having them work at a decent wage and produce products or perform services that can be sold in the marketplace. (In the process, the prisoners can also pay some of the costs of their incarceration and, we would hope, gain some self-esteem.)

Privatization is also different from the situation in which *some* of the services of a facility—such as medical, food, educational, or vocational services—are operated by private industry. Rather, the developing idea, which may turn out to be a lasting force or just a passing fad, is to have the government contract with a private company to run the *total* institution.

Advantages and Criticisms

Privatization has sparked a major debate. Its proponents—including not only some corrections professionals, but also major financial brokers who are advising investors to consider putting their money into private prisons—argue that the government has been doing a dismal job in its administration of correctional institutions. Costs have soared, prisoners are coming out worse off than when they went in, and while they are in they are kept in conditions that shock the conscience, if not the stomach.

The private sector, advocates claim, can save the taxpayers money. It can build facilities faster and cheaper, and it can operate them more economically and more efficiently. With maximum flexibility and little or no bureaucracy, both new ideas (like testing new philosophies) and routine matters (like hiring new staff) can be implemented quickly. Overcrowding—perhaps the major problem of corrections today—can be reduced.

A final—and significant—anticipated benefit of privatization is decreased liability of the government in

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The reader should be aware that the author served as the Reporter on Legal Issues for the National Institute of Justice's National Forum on "Corrections and the Private Sector" (February 1985) and is currently serving as Reporter for the American Bar Association Criminal Justice Section's study on the privatization of corrections. Although the analyses, conclusions, and points of view expressed herein are the author's and do not reflect the positions of the Federal Judicial Center or the National Institute of Justice, a slightly modified version of this article served as the Report that accompanied a Resolution presented by the ABA Criminal Justice Section to the ABA House of Delegates, recommending that "jurisdictions that are considering the privatization of prisons and jails not proceed. . . until the complex constitutional, statutory, and contractual issues are satisfactorily developed and resolved." The Resolution was passed by the House of Delegates at its February 1986 meeting.

[1] *See* H.R. 7112, 97th Cong., 2d Sess. (1982) ("Arctic Penitentiary Act of 1982") (introduced by Rep. Leboutillier).

[2] Keynote Address by Warren E. Burger, National Conference on "Factories with Fences": The Prison Industries Approach to Correctional Dilemmas (June 18, 1984), *reprinted in* Robbins, ed., *Prisoners and the Law*, ch. 21 (New York, New York: Clark Boardman, 1985).

lawsuits that are brought by inmates and prison employees.

The critics respond on many fronts, beginning with two major constitutional objections: the mere fact that the government would no longer directly be operating the institutions cannot shift liability under the Federal Civil Rights Act, 42 U.S.C. §1983, pursuant to which most prison-condition litigation is brought; and, in any event, the government does not have the power to delegate to private entities the authority for such a traditional and important governmental function. In brief, critics argue that, to be properly accountable, the government must operate its prisons and jails and be subject to liability.

As a policy matter, moreover, they claim that it is inappropriate to operate prisons with a profit motive, which provides no incentive to reduce overcrowding (especially if the company is paid on a per prisoner basis), nor to consider alternatives to incarceration, nor to deal with the broader problems of criminal justice. On the contrary, the critics assert that the incentive would be to build more prisons and jails. And if they are built, we will fill them. This is a fact of correctional life: The number of jailed criminals has always risen to fill whatever space is available.

Cost-cutting measures will run rampant. Conditions of confinement will be kept to the minimum that the law requires. As a reporter for *Barron's* has written: "[T]he brokers, architects, builders and banks. . .will make out like bandits."[3] But questions concerning people's freedom should not be contracted out to the lowest bidder. In short, the private sector is more interested in doing well than in doing good. This idea was succinctly expressed recently by the director of program development of Triad America Corporation, a multimillion-dollar Utah-based company that has been considering proposing a privately run county jail in Missoula, Montana: "We'll hopefully make a buck at it. I'm not going to kid any of you and say we are in this for humanitarian reasons."[4]

Privatization also raises concerns about the routine, quasi-judicial decisions that affect the legal status and well-being of the inmates. To what extent, for example, should a private corporation employee be allowed to use force—perhaps serious or deadly force—against a prisoner? It is difficult enough to control violence in the present public-correctional system. It will be much more difficult to assure that violence is administered only to the extent required by circumstances when the state relinquishes direct responsibility. Another important concern is whether a private employee should be entitled to make recommendations to parole boards or to bring charges against a priosner for an institutional violation, possibly resulting in the forfeiture of good-time credits toward release. With dispersion of accountability, the possibility for vindictiveness increases. As an employee who is now in charge of reviewing disciplinary cases at a privately run Immigration and Naturalization Service facility in Houston told a *New York Times* reporter last year: "I'm the Supreme Court."[5]

Finally, the critics claim, the financing arrangements for constructing private facilities improperly eliminate the public from the decisionmaking process. Traditionally, correctional facilities have been financed through tax-exempt general-obligation bonds that are backed by the tax revenues of the issuing governmental body. This debt requires voter approval. Privatization abrogates this power of the people. In Jefferson County, Colorado, for example, the voters twice rejected a jail-bond issue before E. F. Hutton underwrote a $30 million issue for private jail construction.[6] The corporation can build the institution and the government can lease it. The cost of the facility then comes out of the government's appropriation, avoiding the politically difficult step of raising debt ceilings. Once the lease payments have fulfilled the debt, ownership of the facility shifts to the governmental body.[7] This position was acknowledged by Senator Alfonse D'Amato (R-N.Y.),[8] who proposed a bill in 1984 to provide Federal investment and rehabilitation tax credits and accelerated-depreciation deductions for private prison construction.[9]

One example of the potentially egregious effects of reducing accountability and regulation concerns a proposal by a private firm in Pennsylvania to build a 720-bed medium- and maximum-security interstate protective-custody facility on a toxic waste site, which it had purchased for $1. The spokesperson for the Pennsylvania Department of Corrections is reported to have said: "If it were a state facility, we certainly would be concerned about the grounds where the facility is located. [As for a private prison, there] is nothing in our legislation which gives anyone authority on what to do."[10] In the face of proposed legislation in Pennsylvania to place a 1-year moratorium on the construction or operation of private prisons, the company has since abandoned its plan. It reportedly is now attempting to sell the toxic waste site

[3] Duffy, "Breaking Into Jail," *Barron's*, May 14, 1984, at 20, 22.

[4] *Deseret News*, June 20-21, 1985, at B7 (statement of Jack Lyman); *see also infra* n. 50.

[5] *New York Times*, February 19, 1985, at A15 (statement of Corrections Corporation of America employee John Robinson).

[6] Rosenberg, "Who Says Crime Doesn't Pay?," *Jericho*, Spring 1984, at 1, 4; *see also* National Institute of Justice, *The Privatization of Corrections* 45 (Washington, D.C.: Government Printing Office, 1985).

[7] *See* National Institute of Justice, *supra* n. 6, at 40-50.

[8] *See New York Times*, February 17, 1985, at A29.

[9] *See* S. 2933, 98th Cong., 2d Sess. (1984) ("Prison Construction Privatization Act of 1984"). Senator D'Amato has stated that, although he supports the private ownership of prisons, he does not support their private operation. *See New York Times*, February 17, 1985, at A29.

[10] Levine, "Private Prison Planned on Toxic Waste Site," *National Prison Project Journal*, Fall 1985, at 10, 11.

for $790,000, and is seeking to open the protective-custody facility in Idaho.[11]

Constitutional Issues

The relative advantages and disadvantages of privatization are not merely academic, for more than 30 institutions—immigration, juvenile, work-release, and halfway house facilities—are now owned and operated by private groups. Further, a few of the above issues have preliminarily been litigated.

There are two major constitutional questions regarding the privatization of corrections: whether the acts of a private entity operating a correctional institution constitute "state action," thus allowing for liability under 42 U.S.C. §1983; and whether, in any event, delegation of the corrections function to a private entity is itself constitutional. In this section, I shall address the caselaw pertaining to these questions.

State action. When a private party, as compared with a government employee, is charged with abridging rights guaranteed by the Constitution or laws of the United States, the plaintiff, in order to prevail under 42 U.S.C. §1983, must show that the private party was acting "under color of state law." The reason for this is fundamental. The 5th and 14th amendments, which prohibit the government from denying Federal constitutional rights and which guarantee due process of law, apply to the acts of the state and Federal governments and not to the acts of private parties or entities.[12]

The ultimate issue in determining whether a person is subject to suit for violation of an individual's constitutional rights is whether "the alleged infringement of federal rights [is] 'fairly attributable to the State.' "[13] A person acts under color of state law "only when exercising 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' "[14]

Three basic tests have been used to determine "state action":[15] the public-function test; the close-nexus test; and the state-compulsion test. State action will be held to exist if any one of these tests is satisfied. I believe that, in the private prison context, *each* of these tests for state action is satisfied.

Public-function test. The case that is perhaps most directly relevant to state action in the private-prison context is *Medina v. O'Neill.*[16] Sixteen inmates of the privately run Houston Immigration and Naturalization Service facility, who had been confined in a single, windowless, 12-by-20-foot cell that was designed to hold six persons, sued the private corporation and the INS, complaining about these conditions. Another issue in the case was that one private security guard, who had not been trained in the use of firearms, had been using a shotgun as a cattle prod when the gun went off, killing one inmate and seriously wounding another.

The plaintiffs claimed that they had been unconstitutionally deprived of life and liberty, arguing, *inter alia,* that the INS had a duty to oversee their detention and that the defendant's failure to do so constituted state action. In opposition, the Federal defendants contended that at all times the plaintiffs were in the custody of the private company and, therefore, that the problems stemming from the plaintiffs' detention arose from purely private acts. Thus, the defendants averred that there was no state action.

The Federal district court, in 1984, rejected the defendants' argument, finding "obvious state action" on the part of both the Federal defendants and the private company.[17] The court noted that although there was no precise formula for defining state action,[18] the Supreme Court has recognized a "public function" concept, which provides that state action exists when the state delegates to private parties a power "traditionally exclusively reserved to the State."[19] As the Supreme Court stated in 1982 in *Rendell-Baker v. Kohn,*[20] "the relevant question is not simply whether a private group is serving a 'public function'... [but] whether the function performed has been 'traditionally the *exclusive* prerogative of the State.' "[21] The *Medina* court found that detention came squarely within this test.

More recently, in August 1985, the United States Court of Appeals for the Eleventh Circuit, in *Ancata v. Prison Health Services, Inc.,*[22] addressed the question whether a private entity that was responsible for providing medical care to county jail inmates was liable, under section 1983, to the estate of a deceased county jail prisoners who, following recalcitrance and improper diagnosis and treatment by doctors of the private health service, was diagnosed as having leukemia. Finding the state action issue so well settled as not to require extended discussion, the unanimous court of appeals panel stated:

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[11] *See* Elvin, "Private Prison Plans Dropped by Buckingham," *National Prison Project Journal,* Winter 1985, at 11. On March 21, 1986, Pennsylvania Governor Dick Thornburgh signed a bill imposing a 15-month moratorium on private prisons, to allow a panel to study the issues. *See New York Times,* March 23, 1986, at 16; *New York Times,* March 20, 1986, at A22.

[12] *See Shelley v. Kraemer,* 334 U.S. 1, 13 (1948); *Civil Rights Cases,* 109 U.S. 3, 11 (1883).

[13] *Rendell-Baker v. Kohn,* 457 U.S. 830, 838 (1982) (quoting *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937 (1982)). The Supreme Court in *Lugar* found state action when state officers had acted jointly with a private creditor to secure the plaintiff's property by garnishment and prejudgment attachment.

[14] *Polk County v. Dodson,* 454 U.S. 312, 317-18 (1981) (quoting *United States v. Classic,* 313 U.S. 299, 326 (1941)); *see also Evans v. Newton,* 382 U.S. 296, 299 (1966).

[15] The constitutional standard for finding state action is identical to the statutory standard for determining "color of state law." *See Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 929 (1982).

[16] 589 F. Supp. 1028 (S.D. Tex. 1984).

[17] *Id.* at 1038.

[18] *See Burton v. Wilmington Park Auth.,* 365 U.S. 715, 722 (1961).

[19] *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 157 (1978); *see also Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 352 (1974).

[20] 457 U.S. 830 (1982).

[21] *Id.* at 842 (quoting *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 353 (1974)).

[22] 769 F.2d 700 (11th Cir. 1985).

> Although Prison Health Services and its employees are not strictly speaking public employees, state action is clearly present. Where a function which is traditionally the exclusive prerogative of the state (or here, county) is performed by a private entity, state action is present.[23]

Close-nexus test. Another standard that enlightens state-action jurisprudence is the "close-nexus" test. The inquiry here is "whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action of the latter may be fairly treated as that of the State itself."[24]

A good example of the application of this test is *Milonas v. Williams.*[25] The plaintiffs, former students of a school for youths with behavior problems, brought an action against the school on the ground that it had used a "behavior modification" program that allegedly violated their constitutional rights. Specifically, the plaintiffs claimed that the school administrators, acting under color of state law, had caused them to be subjected to antitherapeutic and inhumane treatment, resulting in violations of the cruel and unusual punishment clause of the 8th amendment and the due process clause of the 14th amendment.

The unanimous panel of the court of appeals found state action, because "the state ha[d] so insinuated itself with the [school] as to be considered a joint participant in the offending actions."[26] The court made this determination after considering the following factors: many of the plaintiffs had been placed at the school involuntarily by juvenile courts and other state agencies acting alone or with the consent of the parents; detailed contracts were drawn up by the school administrators and agreed to by many local school districts that placed boys at the school; there was significant state funding of tuition; and there was extensive state regulation of the educational program at the school. These facts "demonstrate[d] that there was a sufficiently close nexus between the states sending boys to the school and the conduct of the school authorities so as to support a claim under Section 1983."[27]

Application of the close-nexus test to the private-prison context should yield the same result, especially considering, among other factors, the involuntary nature of the confinement, the detailed nature of the contracts between the government and the private entities, the level of government funding,[28] and the extent of state regulation of policies and programs.[29]

State-compulsion test. Like the public-function test and the close-nexus test, the state-compulsion test can also result in improper state action, in violation of 42 U.S.C. §1983. The inquiry is whether the state had a clear duty to provide the services in question.

In *Lombard v. Eunice Kennedy Shriver Center,*[30] for example, the plaintiff—a mentally retarded person who was resident of a state institution that had contracted with a private organization for medical services—sued under 42 U.S.C. §1983, alleging that he had been denied adequate medical care, that he had been subjected to inappropriate medical treatment, and that his property had been improperly managed. The defendants contended that because the private organization that provided all of the medical care about which the plaintiff complained was a private entity, the state could not be held accountable for the acts of the private corporation and, further, that the corporation could not be held responsible for not conforming with constitutional and statutory requirements that are applicable only to governmental entities. In short, the issue was "whether the acts and omissions of the [private entity] constitute[d] state action for purposes of the Fourteenth Amendment, and whether [it] acted 'under color of law' for the purposes of 42 U.S.C. §1983."[31]

The court responded to these questions in the affirmative, stating that "[t]he critical factor in our decision is the duty of the state to provide adequate medical services to those whose personal freedom is restricted because they reside in state institutions."[32] The court added:

> [I]t would be an empty formalism to treat the [private entity] as anything but the equivalent of a governmental agency for the purposes of 42 U.S.C. §1983. Whether the physician is directly on the state payroll . . . or paid indirectly by contract, the dispositive issue concerns the trilateral relationship among the state, the private defendant, and the plaintiff. Because the state bore an affirmative obligation to provide adequate medical care to plaintiff, because the state delegated that function to the [private corporation], and because [that corporation] voluntarily assumed that obligation by contract, [the private entity] must be considered to have acted under color of law, and its acts and omissions must be considered actions

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[23] *Id.* at 703; *see also Lawyer v. Kernodle,* 721 F.2d 632 (8th Cir.1983) (private physician hired by county to perform autopsies was acting under color of state law); *Morrison v. Washington County,* 700 F.2d 678 (11th Cir.) (refusing to dismiss physician employed by county from section 1983 action). *cert. denied,* 464 U.S. 864 (1983); *Perez v. Sugarman,* 499 F.2d 761 (2d Cir. 1974) (finding state action for private institution's acts where the City of New York had removed a child from the mother's custody and placed the child in a private child-care institution) *compare Calvert v. Sharp,* 748 F.2d 861 (4th Cir. 1984) (no state action found where private doctor had no supervisory or custodial functions, whose function and obligation was solely to cure orthopedic problems, and who was not dependent on the state for funds), *cert. denied,* 105 S. Ct. 2667 (1985).

[24] *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974).

[25] 691 F.2d 931 (10th Cir. 1982), *cert. denied,* 460 U.S. 1069 (1983).

[26] *Id.* at 940.

[27] *Id.; see also Woodall v. Partilla,* 581 F. Supp. 1066, 1076 (N.D. Ill. 1984) (finding sufficient nexus between private food corporation and state to constitute state action); *Kentucky Ass'n for Retarded Citizens v. Conn.,* 510 F. Supp. 1233, 1250 (W.D. Ky. 1980) (finding sufficient nexus between private residential treatment center and state), *aff'd,* 674 F.2d 582 (6th Cir.), *cert. denied,* 459 U.S. 1041 (1982); *compare Calvert v. Sharp,* 748 F.2d 861, 863-64 (4th Cir. 1984) (finding insufficient nexus between private doctor and state on the particular facts), *cert. denied,* 105 S. Ct. 2667 (1985).

[28] On the question of the private entity's dependence on the state for funds, see *Blum v. Yaretsky,* 457 U.S. 991, 1011 (1982); *Rendell-Baker v. Kohn,* 457 U.S. 830, 841 (1982).

[29] On the question of whether the particular function is subject to extensive state regulation, see *Blum v. Yaretsky,* 457 U.S. 991, 1007-08, 1009-10 (1982); *Rendell-Baker v. Kohn,* 457 U.S. 830, 841 (1982).

[30] 556 F. Supp. 677 (D. Mass. 1983).

[31] *Id.* at 678.

[32] *Id.*

> of the state. For if [the private entity] were not held so responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities.[33]

The foregoing statement virtually summarizes the experiences of the courts on the question of whether the acts of private entities performing functions that are delegated by the state constitute state action. In the context of detention—whether in a prison, a jail, an immigration facility, a juvenile facility, or a mental-health center—the answer is clearly affirmative.

Delegation. In *Ancata v. Prison Health Services*[34]—which involved the contracting out by the county of the provision of medical care to incarcerated individuals—the United States Court of Appeals for the Eleventh Circuit recently stated:

> Although [the private entity] has contracted to perform an obligation owed by the county, the county itself remains liable for any constitutional deprivations caused by the policies or customs of the [private entity]. In that sense, the county's duty is non-delegable.[35]

In other words, there is an area of overlap between state action and the propriety of a delegation of governmental powers: Government liability cannot be reduced or eliminated by delegating the governmental function to a private entity. But the nondelegation doctrine goes further than that, holding that some governmental functions may not be delegated *at all*. Whether the privatization of corrections would be held invalid under that doctrine is debatable; certainly the answer to that question is less clear than is the answer to the question whether such a delegation constitutes state action.

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States...."[36] Strictly interpreted, this clause prohibits Congress from delegating its legislative powers to any other institution.[37] Due to societal changes, advances, and complexities, however, a strict adherence to the doctrine of nondelegation is not possible.[38] Practicality necessitates that many of the comprehensive regulations that are required by modern life be delegated, for they are often too intricate and detailed for the direct legislative process. Thus, Congress—under the "necessary and proper" clause of the Constitution[39]—can "delegate authority...sufficient to effect its purposes."[40] But *which* purposes? Can the governmental functions of incarcerating, punishing, deterring, and rehabilitating criminals constitutionally be delegated to private entities?

Historically, the Supreme Court expressed an antipathy to the delegation of policymaking responsibility to private organizations.[41] Although it has been suggested that the continued vitality of this position is suspect,[42] as the doctrine has not been employed to invalidate a delegation in more than 50 years (with similar experience in many states),[43] the doctrine at the least retains important influence by requiring that Congress provide an articulation of policy along with any delegation of authority. This requirement not only limits agency excesses, but it also facilitates the practicality of judicial review of agency action.[44] Nevertheless, it may be that, with a sufficiently broad delegation of a traditionally exclusive governmental function, the doctrine might be used once again.

In many areas, the courts have regularly allowed private entities to exercise authority that could be characterized as amounting to a deprivation of a property or liberty interest.[45] The area of family law provides a familiar example.[46] And it is also true that, even in areas that are traditionally thought of as belonging in the realm of public rather than private decisionmaking, courts have tolerated broad delegation of lawmaking power to private bodies.[47]

There comes a point, however, where concerns about the fairness of decisionmaking that affects the interests of individuals in what is so clearly a governmental function must outweigh the need for unchanneled exercises of expertise and claims of efficiency and reduced cost.[48] Whether that point is reached with privatization of corrections is a very difficult question, without any good, clear, recent help from the caselaw. Even if such a delegation is constitutional, however, that does not necessarily mean that it is wise to transfer this most basic function of government—the doing of justice—to private hands.[49]

Other Important Questions

Although there has been litigation on some of the issues that are likely to be raised concerning the privatization of corrections, the concept has yet to be fully tested,

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[33] *Id.* at 680.
[34] 769 F.2d 700 (11th Cir. 1985).
[35] *Id.* at 705.
[36] *U.S. Const.* art. I, §1.
[37] *See* Davis, *Administrative Law* §3.4 (3d ed. 1972).
[38] *See* Schwartz, *Administrative Law* §2.1 (2d ed. 1984).
[39] *U.S. Const.* art. I, §8, cl. 18.
[40] *E.g., Lichter v. United States*, 334 U.S. 742, 748 (1948).
[41] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *see also Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).
[42] *See, e.g., FPC v. New England Power Co.*, 415 U.S. 345, 353 (1974) (Marshall, J., concurring and dissenting); *see also* Tribe, *American Constitutional Law* §5-18, at 291 (1978).
[43] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).
[44] *See American Power and Light Co. v. SEC*, 329 U.S. 90, 106 (1946). "The delegation doctrine is alive, but not well articulated or coherently applied by the Supreme Court." Schoenbrod, "The Delegation Doctrine: Could the Court Give It Some Substance?," 83 *Mich. L. Rev.* 1223, 1289 (1985). *See generally* Comment, "The Fourth Branch: Reviving the Nondelegation Doctrine," 1984 *B.Y.U.L. Rev.* 619; Note, "Rethinking the Nondelegation Doctrine," 62 *B.U.L. Rev.* 257 (1982).
[45] *See generally* Note, "The State Courts and the Delegation of Public Authority to Private Groups," 67 *Harv. L. Rev.* 1398, 1399 (1954).
[46] *See, e.g., Parham v. J.R.*, 442 U.S. 584, 602-03 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[47] *See, e.g., Todd & Co., Inc. v. SEC*, 557 F.2d 1008 (3d Cir. 1977).
[48] *See* Jaffe, "Law Making By Private Groups," 51 *Harv. L. Rev.* 201 (1937).
[49] *See infra* nn. 51-53 and accompanying text.

for there are presently no primary medium- or maximum-security adult facilities in the country that are owned or operated by private bodies.

Such adult correctional facilities are different from juvenile, immigration, work-release, and halfway-house facilities. Juvenile facilities, for example, typically require only minimum security, while adult institutions can range from minimum to maximum security. As a result, higher costs for security may be incurred by the private contractor. As the security level increases, so too will concern for escapes, assaults, and prison discipline. Moreover, the special problems of long-term confinement must be considered, for the length of imprisonment in an adult facility is certain to be much longer than the length of stay in a juvenile, detention, or INS facility. Further, the political climate surrounding an adult facility will usually involve stronger public opposition, since the inmates will pose more of a threat to the immediate community. This opposition could delay, as well as increase, the cost of plans to contract with the private sector. For these reasons and others, notwithstanding the claims of proponents of privatization, it may be that lower cost is not an advantage of privatization for adult primary institutions.[50]

If the concept of privatization of corrections does take hold, however, we should move slowly and cautiously, for statutes may have to be amended or repealed, and comprehensive contracts will have to be drafted narrowly and unambiguously. Among the many questions, both general and specific, that will have to be confronted are the following:

- What standards will govern the operation of the institution?
- Who will monitor the implementation of the standards?
- Will the public still have access to the facility?
- What recourse will members of the public have if they do not approve of how the institution is operated?
- Who will be responsible for maintaining security and using force at the institution?
- Who will be responsible for maintaining security if the private personnel go on strike?
- Where will the responsibility for prison disciplinary procedures lie? For example, will private personnel be permitted involvement in quasi-judicial decisions, including not only questions concerning good-time credit, but also recommendations to parole boards?
- Will the company be able to refuse to accept certain inmates—such as those who have contracted AIDS?
- What options will be available to the government if the corporation substantially raises its fees?
- What safeguards will prevent a private contractor from making a low initial bid to obtain a contract, then raising the price after the government is no longer immediately able to reassume the task of operating the prisons (for example, due to a lack of adequately trained personnel)?
- What will happen if the company declares bankruptcy (for example, because of liability arising from a prison riot) or simply goes out of business because there is not enough profit?
- What safeguards will prevent private vendors, after gaining a foothold in the corrections field, from lobbying for philosophical changes for their greater profit?

Questions like these present some hard choices—but ones that will have to be addressed if we should seriously move toward the private ownership and operation of correctional institutions.

Symbolism: The Hidden Issue

In its 1985 policy statement on privatization, the American Correctional Association began: "Government has the ultimate authority and responsibility for corrections."[51] This should be undeniable. When it enters a judgment of conviction and imposes a sentence, a court exercises its authority, both actually and symbolically. Does it weaken that authority, however—as well as the integrity of a system of *justice*—when an inmate looks at his keeper's uniform and, instead of encountering an emblem that reads "Federal Bureau of Prisons" or "State Department of Corrections," he faces one that says "Acme Corrections Company"?

This symbolic question may be the most difficult policy issue of all for privatization: Who *should* operate our prisons and jails—apart from questions of cost, apart from questions of efficiency, apart from questions of liability, and assuming that prisoners and detainees will retain no fewer rights and privileges than they had before the transfer to private management? In an important

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[50] *See, e.g., New York Times*, May 21, 1985, at A14 (reporting $200,000 in cost overruns for privately operated prison in Tennessee); *see also* American Federation of State, County, and Municipal Employees, *Position on Contracting Out Correctional Facilities* (July 1985). Kenneth F. Schoen, former Commissioner of Corrections in Minnesota, has stated: "Private operators claim they can build prisons more cheaply. While more efficient administration of construction may reduce costs, the savings are lost to the higher cost of private borrowing, as against public bonds. And, since prison construction is financed through tax shelters, the effect is to narrow the national tax base, shifting the burden of financing jails to our lower-income taxpayers." Schoen, "Private Prison Operators," *New York Times*, March 28, 1985, at A31.

Further, privatization of prisons and jails may cost the government *more* than public ownership and operation of the facilities would cost because, by delegating the incarceration function, the state may waive the defense of sovereign immunity in ordinary negligence actions. *See* Opinion Letter from W. J. Michael Cody, Tennessee Attorney General, to Shelby A. Rhinehart, Tennessee State Representative, at 2, 10-11 (November 27, 1985).

[51] American Correctional Association, *National Correctional Policy on Private Sector Involvement in Corrections* (January 1985).

[52] *Cf. Carter v. Carter Coal Co.*, 298 U.S. 238 (1936): "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* at 311.

As the executive director of the Vera Institute recently stated: "Justice is not a service, it's a condition, an idea." *New York Times*, September 17, 1985, at A17 (statement of Michael E. Smith). This theme is echoed by the president of the Police Foundation: "Being efficient does not mean that justice will be served." *Id.* (statement of Hubert Williams).

sense, this is really part of the constitutional-delegation issue, in that it could be argued that virtually anything that is done in a total, secure institution by the government or its designee is an expression of government policy and therefore should not be delegated.[52] I cannot help but wonder what Dostoevsky—who wrote that "[t]he degree of civilization in a society can be judged by entering its prisons"[53]—would have thought about privatization of corrections.

Further, just as the prisoner should perhaps be obligated to know—day by day, minute by minute—that he is in the custody of the state, perhaps too the state should be obliged to know—also day by day, minute by minute—that it alone is its brother's keeper, even with all of its flaws. To except any less of the criminal justice system may simply be misguided.

Conclusion

We should not be swayed by brash claims, such as the one by a private facility owner who told a *New York Times* reporter: "I offer to forfeit my contracts if the recidivism rate is more than 40 percent."[54] Nor should we be fooled by the "halo effect"—that is, that the first few major experiments will be temporarily attractive because the private administrators, being observed very closely, will be under great pressure to perform. Prison operation is not a short-term business. We should further be wary that private corrections corporations may initiate advertising campaigns to make the public feel more fearful of crime than it already is, in order to fill the prisons and jails. Finally, and most importantly, we should not permit the purported benefits of prison privatization to thwart, in the name of convenience, consideration of the broader, and more difficult, problems of criminal justice.

To be sure, something *must* be done about the sordid state of our nation's prisons and jails. The urgency of the need, however, should not interfere with the caution that must accompany a decision to delegate to private companies one of government's most basic responsibilities—controlling the lives and living conditions of those whose freedom has been taken in the name of the government and the people. At the least, the debate over privatization of corrections may provide an incentive for government to perform its incarceration function better.

Referring to privatization, the Director of the National Institute of Justice recently stated: "[W]hen we have opportunities to do things more efficiently and more flexibly without in any way harming the public interest, we would be foolish not to explore them to the fullest."[55] What the public interest is, however, and where day-to-day government power should reside, are questions that are too important to leave only to criminal justice professionals and academics. Whatever direction we may take on privatization, we must generate a thoughtful and deliberate review of the complex issues that are involved, for resolution of these issues will say a great deal about how we, as a society, wish to be perceived. To *rush* toward privatization, therefore, is clearly inappropriate.

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[53] Dostoevsky, *The House of the Dead* 76 (C. Garnett trans. 1957).

[54] *New York Times*, February 11, 1985, at B6 (statement of Ted Nissen, president of Behavior Systems Southwest).

[55] 16 *Corrections Dig.* 2 (1985) (statement of James K. Stewart).

Pitfalls in Criminal Justice Evaluation Research: Sampling, Measurement, and Design Problems

BY JULIE LEIBRICH

Senior Research Officer, Department of Justice, Wellington, New Zealand

Introduction

EVALUATION RESEARCH has become increasingly popular over the last 10 years, particularly in the area of criminal justice. Its usual purpose is to assess the effectiveness of a program of action. For instance, do financial assistance programs help prisoners on release? (Oxley, 1984); does corrective training reduce reconviction rates? (Walker and Brown, 1984); do legal aid programs provide help in the way intended? (Oxley, 1983); do fines enforcement procedures bring in the expected revenue? (Brown, Lee, and Tassovali, 1985). This article focuses on some of the more common problems in sampling, measurement, and design. It draws on examples from recent research in the area of justice in New Zealand.

There are no perfect evaluations, there are only more or less useful ones. Ideally, they should establish what a program is doing, judge the impact it is having, increase the self-awareness of people running it, allow managers to adjust, improve, or drop it, and enable policy makers to make informed decisions about general funding strategies.

It is the evaluator's job to find out what is meant by "effective" for any particular program, to work out the best way to measure that, to negotiate a compromise between deadlines and resources, and to plan the most useful way to present the findings. It is also the evaluator's job to be aware of possible uses of the evaluation and to make sure the decisionmaker understands the meaning and the limitations of the findings.

There are many techniques and methods available to evaluators. A major distinction tends to be drawn between quantitative and qualitative research. "Quantitative" usually refers to the analysis of numerical data, generally with parametric tests, preferably within experimental designs. "Qualitative" tends to refer to detailed descriptions of verbal and visual observations made within a holistic approach. In practice, however, these types of approaches overlap and complement each other, and most useful evaluations use an eclectic approach (Patton, 1981; Connor, 1981).

All research is beset by potential biases—the problems which pose threats to validity—and in evaluation research these can be particularly difficult to solve. Questionnaire analysis, for instance, might seem relatively straightforward but is not so in a survey of prisoners, where almost two-thirds have a reading level of Form 1 or less (Callander, 1985).

At every stage there are possible biases. A bias is any process at any stage of inference which tends to produce results or conclusions which differ systematically from the truth. Bias can occur in reviewing the literature, sampling, measurement, design, analysis, interpretation, and reporting the findings. Each stage of research is related to other stages. And so design affects analysis, sampling affects interpretation. Moreover, the process goes full circle. And so reporting the findings affects reviewing the literature for the next person.

Sampling

Selection Bias: When a sample is not randomly selected from the population you are interested in, the people you study may not be typical of that population.

When you want to generalize results from a sample to a population, the sample should be random. However, in some situations, it is not possible to get a random sample, because it is not possible to construct the sample frame. When it is impossible to get a random sample, a study should not be abandoned. It is usually preferable, however, to study a selected sample from the population of interest than a random sample from a selected population. Information that has to be qualified, about the people you are actually interested in, is better than no information at all.

In a recent rape study, for example (Stone, Barrington, and Bevan, 1983), the researchers wanted to study rape victims. They were interested in women who had been raped. Not just women who had been raped and whose case had gone to court (court files give the sample frame). Not just women who had been raped and reported it to the police (police records give the sample frame). They also wanted to talk to women who had been raped but who had not reported it. In this case a complete sample

frame cannot be constructed. In the study in question the researchers formed their sample from women who were contacted through friends, friends of friends, and newspaper advertisements. This procedure meant a selection bias was present, and the results could not be generalized without constraints. Despite this, the researchers provided a valuable and important documentation on the experience of some rape victims.

Nonresponse Bias: When the response rate is low, the sample you are studying may not be typical of the underlying population.

In survey sampling, it is well documented that people who do not respond may be systematically different from those who do respond. The usual means to reduce low response rates are call-back procedures or, in a series of surveys, replacement sampling with previous nonresponders.

In the area of criminal justice research, it is particularly difficult to get a high response rate on surveys of offenders who are given community based sentences (Hermann, 1981). They tend to be transient. They may see dangers in being part of a study conducted by the Department of Justice. In the case of interviews, it can be difficult to make a suitable meeting place. In the case of questionnaires, literacy levels among offenders can inhibit their taking part (Callander, 1985). Furthermore, the ethical considerations when asking people to take part may mean the researcher prefers to make it relatively easy for the person to refuse. When faced with a low response rate, response bias cannot be reduced. However, a comparison of responders and nonresponders (usually from information on files) can improve the interpretation of results through information about possible aspects of that bias.

In a survey of offenders who had served or were serving a community service sentence, the researchers raised a response rate of only 48 percent, despite rigorous call-back procedures (Leibrich, Galaway, and Underhill, 1984). Some of the people in the sample refused to be interviewed. Some did not keep the appointment(s). Some could not be traced—particularly those who had completed the sentence. The study documented similarities and differences between the responders and nonresponders on simple demographic details, details of their previous criminal background, the offense committed, length of sentence, and hours completed.

Volunteer Bias: If volunteers are used in evaluations, you are likely to decide that the program is better than most people think it is.

People who volunteer for studies are usually motivated to do well. People who are volunteered as subjects are usually "best cases." In some situations, however, the researcher may have to interview volunteers.

In a random sample of people sentenced to community service, a few people in the sample came from the East Coast of New Zealand—a remote and rural district. Transience was an even greater problem in this setting, and three out of five people in the sample could not be contacted. The local probation officer decided to provide substitutes. He was keen for the researchers to interview these volunteers. They were, after all, his best cases, and the people from head office should talk to them if they wanted to know how it *really* worked. The researchers did in fact interview the people but could not include the data in the analysis. In evaluations, people's feelings may be more important than rigor.

Mortality Bias: People who drop out of studies are likely to be different from those who stay in.

People who drop out of programs may do so because they are not getting enough from a program to be motivated to stay in it. It is essential, therefore, to document the number of people who drop out of programs and to acknowledge their absence in the evaluation. Not to do so may lead to an enhanced impression of the program's effectiveness.

A similar bias can occur in research into traumatic life events. Rape victims, for instance, tend to move house after the attack (Holmes and Williams, 1979) and therefore may be difficult to trace in a followup study. The likely bias in this situation is that those who are more afraid and who have less support may be more likely to move.

Wrong Sample Size Bias: In some situations, a sample which is too small can demonstrate nothing, and a sample which is too large can demonstrate anything.

A study of 1,543 people sentenced to community service found that women were convicted of statistically significantly less serious offenses than were men (Leibrich, 1985). The finding, however, was unimportant—a median of 72.95 compared to 73.20 on a scale which ranged from 13 to 98. Conversely, it may be impossible to get samples large enough to make substantive differences statistically significant. In an evaluation of a financial assistance program for released prisoners with two samples of size 60, no statistically significant difference was found between the amount of unemployment benefit received on release by the two groups—$60 compared to $46 (Oxley, 1984). But $14 can make a big difference when you leave prison with only $28 in the first place. It is important in evaluations to make the distinction between statistical and substantive differences.

Missing Data Bias: A specific case of nonresponse bias.

In criminal justice research, a popular source of data is court files. It is relatively easy to choose the sample size, to request court clerks throughout the country to take down every 8th, 10th, or 20th file from the shelves and record the required information. But serious bias can

be introduced unless explicit instructions and preferably file references are provided.

In a typical New Zealand court, files are stored on shelves. The clerk searching for every "nth" file may omit the files stored on top of the shelving unit. But these are the ones which don't fit on the shelf because the cases are complex, and the files are too bulky. The clerks may miss the ones that are still in the bailiff's tray or the ones on the registrar's desk or on the judge's desk.

Measurement

Insensitive Measure Bias: The measure you are using to study what you are interested in may not be sensitive to change. Therefore you miss the effectiveness of the treatment.

The more detailed the information you can use, the more powerful the conclusion you can reach. It is relatively easy to identify levels of information in quantitative data analysis—categorical, ordinal, interval, continuous. It is more difficult to identify the different levels of information available in more qualitative research. Useful information is not just what you go out and collect, it is what you are given; it is not just the questions you ask, it is the questions you are asked. It's not just what people say, it is the circumstances in which they say it (Leibrich, 1985).

In criminal justice research, a commonly used insensitive measure is reconviction rates. They are politically attractive as measures of effectiveness, but they are crude measures of success (Conrad, 1981). It may be difficult to decide what event is a failure—an arrest, a prosecution, or a conviction, or what is a reasonable followup period. It is unrealistic to expect one specific event (reconviction) to be a sufficient measure of success in a program aimed at complex or subtle attitudinal and behavioral change (Leibrich, 1984).

The Instrumentation Bias: If the way you measure the outcome is not valid or reliable, you will not get accurate results.

In New Zealand, different government departments use different definitions of ethnic categorization. The ethnic statistics given in the official Justice Statistics, for instance, cannot be compared to the official Census Statistics without bias (Fifield and Donnell, 1980). Similarly, statistics about Maoris in prison cannot be compared with arrest statistics without bias, because the Police and Justice Departments use different definitions of "Maori."

The Unacceptability Bias: When you ask questions which are embarrassing or threatening. People are unlikely to give you honest answers.

The actual extent of this bias can never be known. But it might be reduced by the way in which questions of confidentiality are handled, how the information will be used, and what payoff there will be for being honest.

In a recent study of issues in the Family Court (Leibrich and Holm, 1985), the payoff for being honest was emphasized, as the interview situation was seen as an opportunity for people to influence change. In research on offenders, however, where long-term program goals are unlikely to have any obvious relevance, payoffs may seem remote, so the questions of confidentiailty and use of information may be more important. Similarly, confidentiailty is particularly important in research involving victims. In a current study of domestic violence, the researcher has guaranteed she will be the only one to listen to the tapes of the interviews (Lee, 1985).

Design

Maturation Bias: There may be a real change, but it may be due to the fact that time has gone by and people have matured.

In followup studies of criminal justice programs, 2 or 3 years are commonly used as the followup period where reconviction rates are the measure used. Yet statistics show that the proportion of convicted offenders is higher among the teenage to young twenties age range. As people mature, they either start to go straight or are far less likely to be caught. And so, in the absence of a control which examines the effect of time per se, or controls which allow relative successes of penal programs to be assessed, the apparent success of a penal program might simply be related to people getting older.

History Bias: This is when there is a real change, but it is due to change in the world, in historical events.

History bias can be a particular problem in institutional settings, where apparently minor changes might affect the population of what is essentially a small world. What staff are on leave, what drugs have been dropped off, who is on punishment, who has escaped. Many internal events can cause historical bias in a prison setting, as well as external events. There is no protection against history bias when a study is examining a program in a real-world setting. But it is essential for the researcher to explore the conditions of the research retrospectively and consider if this kind of bias might have accounted for the findings.

Prior Difference Bias: This is when there seems to be a change due to treatment, but it is due to a difference which already existed between the groups studied.

Controlling this bias is the fundamental reason for using control groups and random allocation to treatment. In criminal justice evaluations, however, this is often not a possible solution (Latzer and Kirby, 1981; Shapiro, 1984). And so most evaluations use quasi-experimental designs (Campbell and Stanley, 1969). While the com-

parison group design is no where near as robust as a control group design, it can be a great improvement on no comparison at all.

An illustration of this comes from a study of reconviction rates of people sentenced to community service (Leibrich, 1984). Random allocation by the judge to a sentence versus no sentence is not yet an approved research method in New Zealand. Neither is random allocation to one of two sentences. But the reconviction rate for a group sentenced to community service gives no clear information about the effectiveness of the sentence. A low reconviction rate, for instance, could have been due to a rise in employment rates. A comparison with another sentence group was therefore used. Random samples of two sentence groups were compared, where procedure for selection, followup period, and measurement was identical. When the reconviction rates of people on community service were compared with the reconviction rates of people on periodic detention (an older community based sentence), it appeared that those on community service were significantly less likely to reoffend. This could be an encouraging finding for program development staff. When the two groups of offenders were compared on factors related to reconviction, however, those sentenced to community service were far less likely to reoffend in any case. Further, when sentence groups who had a similar likelihood of reconviction were compared, the initial differences in reconviction rates (apparently due to treatment differences) largely disappeared.

General

The role of the evaluator in a government department can be uncomfortable at times. To the operational staff within the department, who often end up doing the donkey work in evaluations, the research division may seem like Fairyland—the only place that evaluates but is never evaluated. To people outside the department, the researcher can be someone to tell their troubles to. (After conducting a long interview with a community service sponsor, she offered me tea. As she put the kettle on, a knock on the door heralded the completely unexpected arrival of the mother of the offender whose progress we had been discussing. It seemed such a remarkable coincidence until I realized three cups had been set out all along!)

Preserving confidentiality is a particularly difficult problem in a country as small as New Zealand. In an evaluation of the community service sentence (Leibrich, Galaway, and Underhill, 1984), there were problems, for instance, concealing the identities of judges in the description of their views and opinions.

Ethics are a special problem in situations where the subjects have already lost their freedom. There is a problem, for instance, in assuring yourself that offenders have taken part in a study voluntarily. Where offenders have to be approached through other people, the researcher loses control of the subtle emphases that may be desired. Ethical problems exist in that a distinction is usually made between file research and face-to-face research. Both, however, impinge on the privacy of the individual. Yet consent is rarely sought for the former.

Evaluations can be used to develop or change policy, to create or eliminate jobs, or to fund or cut back on programs; thus, errors in research can be costly (Nagel, 1982). Evaluations often assess people's performance, and so they can be threatening. They are usually conducted in the real world, and so complete control of the environment is impossible (Struening and Guttentag, 1978). They tend to assess complex dynamic behaviors in settings where ethical considerations are nearly always a key factor, and so the more developed techniques and measures of experimental research can be quite inappropriate (Patton, 1981). They can be entangled with political events, and so the researcher can be pressured by changing deadlines or by having to formulate an inappropriate definition of the problem (Kennedy, 1984).

There are many problems in research which is conducted in the context of real-world contraints and expectations. In evaluation research, it is particularly important that evaluators are aware of the potential pitfalls. This article has discussed some of the specific biases in sampling, measurement, and design which can occur. There are many techniques and methods available to evaluators, but there are no perfect evaluations. The solutions to problems in evaluating usually lie in compromise.

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Crime Victim Reparation: Legislative Revival of the Offended Ones

BY KEN PEAK, PH.D.

Chairman and Assistant Professor, Department of Criminal Justice, University of Nevada Reno

Introduction

POLICE OFFICERS in America, by virtue of their empathy and crime scene presence, are among the most crime victim-oriented members of our society. However, it might also be argued that they become, at the same time, insensitive and phlegmatic where victimization is concerned. Several authors have documented this aspect of police personality. Because police see the victims at their worst, it may well be that emotional detachment from the chaos and trauma that often surrounds them is a major form of "self defense" in the police arsenal; this phenomenon is given relatively little attention in the literature, however. Stratton (1983) acknowledged the "need for non-emotional response" accompanying the police function, as they "continue to keep up a brave front."[1] If the police become excited, emotional, or hostile, they tend to arouse similar emotions in others.[2] Skolnick (1966) observed that police are under constant pressure to appear efficient,[3] while Niederhoffer's (1967) study of police recruits in New York established that "Cynicism. . .is deeply entrenched in the ethos of the police world."[4] Having performed law enforcement and order maintenance functions at myriad crime scenes involving property loss and bodily harm, police officers, not surprisingly, tend to become more and more complacent about such matters—much like "Dragnet's" famed Sergeant Friday: "Just the facts, ma'am!" The officer for the reasons described above may become hardened to the pain or loss of the victim, the trauma of death, or the severe distress in the aftermath of a rape. "Just the facts, ma'am."

Then one day, as in the case of the author, the police officer arrives home to find that his own private domain has been invaded, desecrated by burglars. The recording officer comes now to *his* house, appearing detached and mechanical as he completes the obligatory report forms. Suddenly, the victim officer experiences the same breadth of emotions as other victims do. There is the knowledge, too, that he will now become a mere statistic in some computer—an infinitesimal part of the FBI's annual *Uniform Crime Reports*. At this point, perhaps for the first time in many years, he witnesses the general lack of victim advocacy and appreciates the victim's plight. Crime now becomes personalized; it evokes feelings of anger, fear, and frustration. The victim may then consider some public attitudes toward crime victims repugnant. An opinion such as that of Benjamin Mendelsohn is a case in point.

Mendelsohn was a French barrister who studied rape offenders and authored a book entitled *Rape in Criminology*. The main thrust of his work was to present methods of defense against charges of rape—a treatise for defense attorneys. At the core of his argument was the ability of the victims to resist. He described the "inexpugnable" position of the female sex organs, noting that (1) they are not situated at the extremities of the body, exposed to attack; (2) they are sheltered in the most hidden places of the external portion of the body; (3) they do not constitute a prominence by a cavity, sheltered within the body; and (4) they are protected by two lower limbs that possess great mobility and power of resistance.[5] Mendelsohn did concede that greater strength, threats, or surprise by the attacker might serve to militate against the victim's ability to resist—not much consolation for rape victims, however.

After being victimized and hearing such flip commentaries, the victim might take solace in the knowledge that at one point in time practically all societies put the crime victim on a pedestal. While today's American justice system has a long way to go before it can say unequivocally that it accords the concern due its victims, we may easily find that such was not the case in earlier times. The historical treatment of crime victims is traced below, beginning with the lofty status they once they enjoyed,

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[1] John G. Stratton. *Police Passages*. Manhattan Beach, California: Glennon Publishing Company, 1984, p. 228.

[2] Clemens Bartollas, Stuart Miller, and Paul Wice. *Participants in American Criminal Justice*. Englewood Cliffs: Prentice-Hall, Inc., 1983, p. 89.

[3] Jerome H. Skolnick. "Why Police Behave the Way They Do," *New York/World Tribune*, October 23, 1966, pp. 12-14.

[4] Arthur Niederhoffer. *Behind the Shield: The Police in Urban Society*. Garden City, New Jersey: Doubleday, 1967, p. 141.

[5] B. Mendelsohn. "Rape in Criminology," *Giustizia Penale*, 1940.

followed by an overview of their demise in status; finally, the contemporary treatment and legislation for this group is presented.

A Historical Sketch of Crime Victim Treatment

In the early history of mankind, social control was placed in the hands of the individual. One freely took the law into one's own hands and defended oneself at will. Private revenge was exacted against evildoers. An offense might place the offender in the unenviable position of suffering the wrath of the victim's entire family. Eventually, unwritten folkways became matters of record. Following are some examples of the kinds of quantitative policies of earlier justice systems that prescribed damages for certain crimes:

—the law of Moses required that should an ox or sheep be stolen, restitution be made in the form of five oxen and four sheep (see Exodus 22: 1-9; also, see Leviticus 25: 17-22 for other examples of Biblical restitution).[6]

—The Code of Hammurabi (about 2200 B.C.) sometimes demanded retribution that was thirty times the value of the object taken or damage caused.[7]

—in the Roman Law of the Twelve Tables, thieves caught in the act paid double the value of objects taken; if the thief escaped and was later found, he or she paid triple, and four times if stolen by force.

—under the early Mosaic Law of the Hebrews, if one person struck another while fighting, with serious injury resulting, the perpetrator was obligated to pay for the injured person's time spent recuperating as well as his total healing.

—revenge among the ancient Germans was strictly monetary, and even homicide could be atoned by a certain fine in sheep or cattle. "Criminal procedure" was satisfied provided the victim was satisfied.[9]

—in the Ifugoa tribe in Northern Luzon, if a married man raped a married woman, the victim's family, her husband's family, and the family of the offender's wife all collected damages.[10]

—in 871 A.D., under the "Dooms" of King Alfred, a bloodfeud was initiated only after compensation had been denied the victim by the offender. The law provided that if an aggressor knocked out the front tooth of another, the victim was paid eight shillings; an eyetooth was worth four shillings; and a molar, five.[11]

"Composition," meaning to combine punishment and damages for personal wrongs, served to placate victims. This caused a reduction in the formerly popular bloodfeuds or family free-for-alls. As long as the victim was made "whole" again by some form of payment, justice was served.

After the Middle Ages, crime victims suffered a major setback in their historically powerful, almost dictatorial, place in the settlement of criminal cases, where criminal justice served only the victim's private interests. In Greece the law distinguished between sanctions against the person and property. If punishment was levied against the offender, the matter remained, as before, part of the criminal law. However, if the court levied a punishment against his property (i.e., a fine), the matter was considered in the body of civil law.[12] And there were great difficulties in distinguishing between civil and criminal law.

Eventually all restitution made by the offender went to the state, and we, in adopting most of our American system of justice from England, have continued much of that tradition through the centuries. The demise of the victim's former role and exalted position became complete when reparation was made to the king's coffers rather than to those who had suffered directly. Hence, the criminal-victim relationship became a civil ("tort") matter, separate and remote from the usual legal considerations in the forum of the criminal trial. Crime had officially become an offense against the state, not the individual.

While it would require a protracted amount of time, this system—which in effect ignored the victim's existence concerning restitution—eventually began to draw strong criticisms from persons of considerable stature in the field of criminology. In 1885, Rafael Garafalo raised the issue at a gathering of penologists in Rome expressing his view that compensation to victims for their pain and losses was "a matter of justice and social security."[13] At the International Penal Congress in 1891 at Christiana, the following were resolved:

1) Modern law does not sufficiently consider the restitution due to injured parties.
2) In petty crimes, a time limit should be given for payment to the victim by the offender.
3) Prisoners' earnings while in prison should be considered for use toward restitution.

Further, the question of proper indemnification to the crime victim was exhaustively discussed at the same congress in 1895 in Paris and in Brussels in 1900. As a result of these kinds of public appeals and declarations of concern, we have witnessed a renewed interest in the plight of, and reparation of, those who suffer at the hands of crime perpetrators.

Modern Revival of Crime Victims

In a contemporary vein, there is evidence that we may be resurrecting our victims. We seem to be loosening the shackles of hundreds of years of neglect, not only in the

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[6] Margery Fry. *Arms of the Law.* London, 1951, p. 124.
[7] John L. Gillin. *Criminology and Penology.* New York, 1945, p. 337.
[8] Exodus 21:18,19.
[9] Tacitus, *Germania,* Chapter 21; quoted in Gillin, *op cit.,* p. 338.
[10] E. Adamson Hoebel. *The Law of Primitive Man.* Cambridge, Massachusetts, 1954, p. 53, 116, 120.
[11] Gillin, *op cit.,* p. 338.
[12] M. Voight. *Die XII Tafeln.* Leipzig, 1883, pp. 538-539.
[13] Raffaele Garofalo. *Criminology.* Boston, 1914, pp. 434-435.

United States but around the world. Schafer has observed that there are presently five different systems of victim restitution in existence internationally:

1) *Damages that are strictly civil in nature* (the system now presumably used in the seven states in the United States not having formal compensation boards). Here, the victim's plight is largely ignored. As Schafer stated, "It is rather absurd that the state undertakes to protect the public against crime and then, when a loss occurs, takes the entire payment and offers no effective remedy to the individual victim."[14]

2) *Compensation that is civil in character but awarded in criminal proceedings.* Even where this system exists, courts appear to favor avoiding it in practice, preferring that a civil damage suit be used. While a hearing for a compensation claim may be heard at criminal trial, the tendency is to allow the trial to receive precedence and the compensation hearing to be conducted separately.

3) *Compensation that is civil in nature but inexorably meshed with criminal proceedings.* Here, restitution has a purely punitive connotation, where a compensatory fine is levied in addition to any ordinary punishmnent imposed.

4) *Compensation that is civil in nature, awarded in criminal proceedings, and underwritten by the state.* The state pays all or part of the offender's obligated remuneration to the victim.

5) *Compensation that is neutral in nature and awarded by a special procedure.* Used in 43 American states, Switzerland, and New Zealand, this system involves neither civil or criminal courts, but instead utilizes a separate board of laymen to consider claims and grant awards from the state's fund. These programs often receive the bulk of their revenues from fines and/or court costs.[15]

Schafer also found in a study of Florida prison inmates that an overwhelming majority of them, particularly murderers, wished they could make some form of reparation to their victims' families. Schafer felt this was partially due to their impending execution for their crimes; he also opined that offenders must be made to recognize their responsibility to their victims.[16]

Albert Eglash, a psychologist with strong ties to the corrections field, wrote that restitution can be an effective rehabilitative device if used properly. Eglash felt that restitution could contribute to the inmate's self-esteem and therefore redirect his thoughts and actions in a more constructive direction; it could also alleviate guilt and anxiety, which can precipitate further offenses.[17]

There are several problems connected with the issue of offender-to-victim-restitution programs, however. For example, only a minority of offenders are caught and convicted; when such is the case, they are largely poor and virtually judgment-proof. Further, prison earnings can scarcely be expected to meet more than a fraction of the cost of damage.

Then, there is the philosophical opposition to the concept. Former U.S. Senator Mike Mansfield made a poignant statement in 1977 during Congressional hearings on crime victim compensation. He noted that we have Social Security and Medicare; Aid to Dependent Children; Black Lung Benefits; assistance for the handicapped, the aged, the blind; and no-fault insurance—all of which reflect a collective responsibility. But this kind of concern has not materialized for crime victims, he said. Margery Fry, author of *Justice For Victims*, cited the case of a man blinded as a result of a criminal act. The English court ordered the two assailants to pay the victim a fixed sum of money and set a weekly payment schedule. Fry calculated that under the court's weekly payment schedule, it would take the attackers 442 years to satisfy the debt.[18]

Existing State Restitution Programs for Crime Victims

Today the condition of crime victims is not as dismal in the United States as was the case for several centuries. The states have undertaken to rectify the lack of victim aid through the inception of their own compensation programs. Though quite varied in nature, as will be seen, they each seek in their own way to make their resident crime victims "whole" again.

Presently, 43 states (or 86 percent) and the District of Columbia provide some financial award through a victim compensation program. This number is increasing. There are several characteristics of the programs that tend to be integral to the state programs, generally speaking, although each program is unique. These general traits that the programs tend to have in common are as follows:

1) The victim must provide evidence of a *physical* injury (rape is included automatically, as a rule). "Emotional" injuries and psychological damage are generally not covered. To receive Federal assistance, however, a state must demonstrate among other things that it does compensate victims for psychological counseling (discussed more fully below).

2) The victim must not have been a participant in the crime or have contributed to his own injuries.

3) The victim must have cooperated with law enforcement authorities in reporting and investigating the of-

[14] Stephen Schafer. *Victimology: The Victim and His Criminal.* Reston, Pennsylvania: Reston Publishing Co., 1977, pp. 27.

[15] *Ibid.*, pp. 105-110.

[16] Stephen Schafer. "Criminal-Victim Relationships in Violent Crimes." Unpublished research, U.S. Department of Health, Education and Welfare, July 1, 1965, MH-07058.

[17] Albert Eglash. "Creative Restitution: Some Suggestions for Prison Rehabilitation Programs," *American Journal of Correction*, 1958, pp. 20-34.

[18] Margery Fry. "Justice for Victims," *The Observer.* London, July 7, 1957.

fense. Normally, the state requires that the crime be reported within a specific time period. The Federal assistance act acknowledges that, for fear of retribution or other reasons, a victim may fail to fully cooperate with law enforcement. Consequently a state may receive Federal victim compensation grants without requiring full cooperation if the victim can demonstrate that the failure to cooperate was due to a compelling health or safety reason.

4) About half of the states with programs require that the victim meet a "needs test" or a "means test"—a showing of one's inability to pay debts (e.g., medical bills, loss of wages, funeral expenses) without suffering financial hardship. The states presently tend to be removing this clause, however.

5) Funding for the programs is generally provided through general revenues, criminal fines and penalties, or a combination of the two. The best way to sustain enough revenue for awarding grant funds would appear to be through fines and penalties. This would seemingly provide a more solid and dependable financial base for the program than those programs depending on annual allocations from the state legislature. But on closer examination this may not always be the case. For example, McGillis and Smith (1982) surveyed existing compensation programs and found that during their most recent fiscal or calendar year, 16 (or 62 percent) of the responding states lacked sufficient funds to meet their obligations to grantees. Of these states experiencing financial difficulty, 38 percent acquired their funds through general revenues, while 38 percent operated through fines and penalties. The remainder utilized a combination of these two.[19] A case in point is the Washington State program, however; after operating for several years, it was not funded by the legislature in 1982. To staff and rejuvenate the program following this hiatus was difficult at best, which points to the tenuous nature of funding that is dependent upon the state legislature's largesse.

Without question, the major factor causing problems with the present 43 state programs, though, has been their financial situation—acquiring and maintaining enough revenue to satisfy legitimate claims. For this reason, as MacNamara and Sullivan (1972) observed, "The concept of 'offender-restitution-to-his-victim' has proved more popular as a theory than feasible in practice."[20] For example, a claimant in a western state waited 8 months for an award due to a mugging in which he suffered a leg broken in three places and which left him unemployed. The state's compensation fund had dried up, prompting the victim to ask a reporter, "How come they set up the program if they don't have the money for it?" A legislator in the same state, bemoaning the situation as well, stated that "They (the legislators) give $100,000 for commemorative gifts for officers and crew of a submarine, $100,000 to. . .a historical railroad, and $250,000 just to attract a nuclear particle accelerator. But they will not give one single dime to victims' compensation." The various restrictions and conditions alluded to earlier (e.g., the "means test," limits placed on the dollar amounts of awards and excluding claims not involving physical injury) are largely due to these kinds of financial and philosophical problems.

Notwithstanding these limitations, there have been several notable and recent innovations implemented by state programs. For example, a handful of states have allowed victims to sit as members of compensation boards during consideration of grant applications. This is in response to criticism that the boards have excluded victim input and lack empathy. At least seven states enacted legislation in 1985 which compensates victims of drunk drivers—normally an excluded group. Virginia went the opposite direction, however, excluding this class of victims after previously compensating them. About a dozen states now also have the "Son of Sam" statutes, barring personal profit through criminal deeds by requiring that all or part of proceeds from books, personal appearances, etc. go into the state's victim compensation fund. Further, some states are relaxing what has been known as the "family exclusion"—family members of offenders being prohibited from collecting awards. For example, Florida has amended its statutes to allow compensation to children who are victims of abusive parents.

Regarding general characteristics of the states' compensation programs, an analysis of McGillis and Smith's (1982) data revealed the following descriptive information: 40 percent of the states received their compensation revenues through the state's general revenues, 38 percent through fines and penalties, 19 percent through a combination of these two, and 3 percent through some other means (e.g., bond forfeitures, "Son of Sam" proceeds, and so forth). Grant awards averaged $3,113, with a range of $1,050 in New Mexico to $12,500 in Rhode Island. The median award figure was $2,600, and the mode was $3,000.[21]

New Federal Assistance for Victim Compensation Programs

On October 12, 1984, President Reagan signed Public Law 98-473, enacting the Comprehensive Crime Control Act of 1984. Chapter 14 of the Act is cited as the "Victims of Crime Act of 1984," which guarantees financial

[19] Daniel McGillis and Patricia Smith, "Compensating Victims of Crime: An Analysis of American Programs," in U.S. Congress, Senate, Committee on the Judiciary, *Victims of Crime Assistance Act of 1984*, Hearing, 98th Cong., 2d.Sess., on S.2423, May 1, 1984 (Washington, D.C.: U.S. Government Printing Office, 1985).

[20] D. MacNamara and J. Sullivan. "Composition, Restitution, Compensation: Making the Victim Whole," *The Urban Review*, 6, 3, 21-25, 1973.

[21] McGillis and Smith, *op cit.*

support to eligible crime victim compensation programs in the states. The passage of this legislation culminated approximately 8 years of Congressional attempts to aid victims of crime, during which time the two Houses could not agree on the final form this legislation should take. But the final product is a manifestation of the Federal government's two-pronged view of justice system needs in America: (1) to improve public confidence in the criminal justice system in general; and, (2) to take a leadership role in assisting crime victims, while giving the states control over the structure and function of their respective compensation programs.

The Act establishes a Crime Victims Fund in the Treasury, where specified fines, penalties, and forfeited bonds and collateral are to be deposited through September 30, 1988, up to a cap of $100 million. Fifty percent of the total amount deposited is earmarked for victim compensation programs, with the remaining 50 percent dedicated to victim assistance programs (e.g., rape crisis centers, hotlines, other sources of help not involving monetary awards). The Act further provides that the program administrator—the U.S. Attorney General—may expend up to 5 percent of the latter monies in the fund to provide services for Federal crime victims.

A state's crime victim compensation program is eligible to receive up to 35 percent of the amount it awarded to crime victims during the preceding fiscal year, provided that it did the following: compensated victims for medical and funeral expenses and loss of wages; promoted victim cooperation with the reasonable requests of law enforcement agencies; made compensation awards to Federal and nonresident victims; and provided assistance for mental health counseling.[22]

Summary and Conclusion

The historically changing fortunes of crime victims has been traced, with emphasis placed upon the attitudes toward crime victims by various civilizations, levels of government, legislators, and the police.

Historically, the victims of crime were accorded considerable respect and freedom toward satisfying criminal wrongs against them. After the Middle Ages, however, the victim lost favor, as it were, with much of the proceeds of offender-to-victim restitution being diverted into the coffers of the crown. It was but a short time until offender restitution was made to the government *en toto*.

It has been shown, however, that these sufferers currently enjoy a revival of their former lofty status through compensation programs presently existing in 43 American states. The United States Congress recently enacted legislation to assist in compensating crime victims, which has been described in detail.

The need for additional research is strongly indicated. It appears likely that about all states will be quick to qualify for, request, and receive the new Federal assistance monies, possibly bringing by accident or design a vastly different character, role, and function to the programs. As a result, one might reasonably expect the states to expand their criteria for eligibility and maintain fewer restrictions on award eligibility. These developments should be studied carefully. Surveys should also be performed to determine whether or not general knowledge of the existence of state programs is enhanced via publicity attending the new crime control act. It is well documented (for example, see Elias [23] and Meiners [24]) that information about compensation programs is not widespread as a rule.

It may well be that those in our society who have personally known "victim aftershock"—"the losses, the agonies, the frustrations, the inconveniences" [25]—will begin again to seek their just rewards. We are seemingly entering an era of optimism for crime victims. Nonetheless, ongoing research should be carefully planned and implemented in order that the impact of government's helping hand may be accurately assessed.

[22] See Victims of Crime Act of 1984, Pub. L. 98-473, Title II, Chap. XIV, 42 U.S.C. 10601, which was signed into law on October 12, 1984.

[23] Robert Elias. *Victims of the System*. New Brunswick: Transaction Books, 1983, p. 31.

[24] Roger E. Meiners. *Victim Compensation*. Lexington, Massachusetts: Lexington Books, 1978, p. 58.

[25] James E. Morris. *Victim Aftershock*. New York: Franklin Watts, 1983, p. 2.

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Achieving Reform in Unstable Institutions: A Theoretical Perspective

BY SALVATORE CERRATO

Correction Officer, Essex County Jail, Newark, New Jersey

Introduction

REFORMING INSTABILITY in correctional institutions has been preempted by concern for immediate order. Stability has proven to be an elusive goal and has been shunted aside as either too intangible a concept or too idealistic an attainment. Order, in contrast, is both more tangible and more easily attained. In fact, the quest for stability has become subordinate to a stagnating form of order in which placation rather than reformulation is the guiding policy in efforts to reform correctional instability.

To better understand this dangerous trend in correctional policy, it is first necessary to establish what is meant by stability and to distinguish it from the concept of order. For analytical purposes, we shall define stability as a condition of homeostasis in which the philosophical details of administrative policy are in balance with the structural and organizational operations of the institution. An institution in a state of stability is characterized by long-term planning, coherence, decisiveness, respect, and authority; it is neither easily thrown off balance by the exigencies of rapid demand nor likely to break down, fall apart, or given way under the pressures of reactionary, bureaucratic, or revolutionary change. In short, there is a hierarchical structure of authority which is sensitive to organizational demands as well as the needs of the staff and inmates.

Order, on the other hand, is a temporary condition of functional operation created by administrative policy characterized by short-term, inconsistent, reactive, and placative decisionmaking. The organizational demand for order supercedes the needs of the staff and inmates. Too often, order is established in correctional institutions only through the constant placation of inmate hostility[1] and is a consequence of the failure of correctional authorities both to make more than minor changes in institutional policy and to adequately provide for the needs of inmates within their institutions.[2]

Instability refers to the breakdown of both the structural and functional processes of the institution; it results in such severe disruptions of the correctional system as inmate breaks, uprisings, riots, the loss of life and property, and the suspension of previous institutional reforms. Without a well conceived, properly implemented program of internal reform which addresses administrative deficiencies, instability threatens to become a permanent condition of our prisions and penal establishments.

Stability has proved to be elusive simply because its attainment was unrealistically assumed to be an automatic outcome of social change and correctional philosophy in general. While this article explores the relationship of these factors, it focuses on the more pertinent, contributory, and often overlooked factor of administration—ill-qualified administrators. In addition, I will attempt to pinpoint the theoretical and practical failings of emphasizing order and to present proposals for establishing nonplacating, authoritative, and coherent administrative strategies.

Two Views of Correctional Stability

The Traditional Reform Viewpoint

The emphasis on order rather than on stability in reform has been recognized only tangentially by correctional authorities (i.e., they focus their attention on placating inmates and thus achieve only temporary order). Imposing order often means instituting policy directives that superficially address inmates' collective protests and temporarily secure limited inmate compliance. The contemporary situation in unstable institutions is noted only in passing, its events (disturbances) are explained simply in terms of failing to mandate policy directives that correctional officials assign to their concept of stability. This perspective sees the etiology of prison riots

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[1] Inmate placation is an optimistic ideology which attempts to bring institutional order—an unstable peace. It is a practice which has been overexercised by contemporary correctional authorities to temporarily arrest inmate instability by "purchasing" conformity. The number of incidents in which an orderly institutional environment has been reestablished only through placation of inmate hostility is one indication of a shift of emphasis from stability to order in the reform of instability.

[2] The failure of correctional authorities to develop adequate policies for inmates is largely a consequence of administrative biases in the form of nonrecognition or limited recognition of inmate needs. For example, it is necessary for correctional authorities to plan for impacts of changes in sentencing policy (e.g., the impact of mandatory minimum sentences on the demographics of the prison base). Since many offenders are essentially serving very long terms, it is incubent that correctional authorities gear programs based on a philosophy focused on "inmate adaption to prison life," not on "inmate reintegration to society." In short, programs must be developed that adequately reflect the specialized needs of a changing prison population. In 1972, a Harris survey found that over half of those questioned (58 percent) felt correctional authorities don't understand inmate needs. See John Irwin, *Prisons in Turmoil* (Boston: Little, Brown and Company, 1980), p. 112.

as an inevitable consequence of failing to institute appeasement.[3]

On a more theoretical plane, penologicial discussions of reform describe the stability of correctional institutions as an inevitable outcome of evolutionary change,[4] while analyzing unstable institutions in terms of "gaps" in their development. These discussions focus on the transition of institutions from unstable to stable as an outcome of what is arbitrarily defined as modern correctional philosophy: policies and practices geared toward inmate needs. Berk[5] and Street[6] have indicated that as correctional authorities shifted their orientation from custody to treatment, inmates perceived the change as more congruent with their needs. As a result, institutional deprivations, a major factor in institutional disturbances,[7] become less pronounced, while inmate populations express more favorable attitudes toward, and become more supportive of, staff and the administration. Similarly, Moos stated that:

> . . . there are direct relationships between the social climate on a correctional unit and the general reactions of residents to that unit and the types of initiatives which residents perceive themselves as likely to take on the unit. Different social climates have different predictable effects on the inhabitants who live within them.[8]

The lack of focus on reform of unstable institutions can be seen as a remnant of an earlier optimism about the ultimate destiny of traditional punitive practices. This optimism assumed a change in correctional philosophy—the growth of humanitarian sentiments toward a rational and humane penal policy—as an inevitable replacement for the atrocities (corporal and capital punishment) of the 18th century. Such "optimism," and the lack of focus on reform, have their origins in a linear, evolutionary model of social change. According to this model, social change is inevitable and will, in the long run, produce a positive change in unstable institutions.[9]

However, the contemporary history of American penal institutions appears to run counter to the evolutionary model. A positive change in correctional philosophy did not result in the reform of institutional policy. In fact, a curious reversal may have taken place. As Rothman implied in *The Discovery of the Asylum,*[10] the treatment of criminals in the colonial period was benign by contrast with subsequent developmetns following the advent of the penitentiary. Foucault concurs:

> The transition from the public execution, with its spectacular rituals, its art mingled with the ceremony of pain, to the penalties of prison buried in architectural masses and guarded by the secrecy of administrations, is not a transition to an undifferentiated, abstract, confused penalty; it is the transition from one art of punishing to another, no less skillful one. It is a technical mutation.[11]

There are problems in viewing social change and, by implication, progressive correctional philosophies, as being virtually inevitable. Although a change in correctional philosophy is considered to be one type of social change, the terms "social change" and "progressive correctional philosophies," as they have come to be understood, tend to overlap ambiguously. Because traditional correctional institutions, by definition viewed as lacking adaptability, are perceived as institutions that must inevitably falter in the face of social change, social change assumes an almost inevitable change in correctional philosophy. Furthermore, the notion of inevitability causes the concept of stability to become very specifically defined. That is, institutional stability is perceived to be concerned not so much with initiating change, which is inevitable, as with managing change and its consequences. Consistent with this view, the disorders that have become characteristic of penal institutions result from a change in correctional philosophy that has gotten out of hand, a process stemming from lack of administrative sophistication in formulating and mobilizing the resources to attain new goals. In other words, disorder stems from correctional authorities which possess too few formal skills to marshall the resources of social change.

A New Model

The evolutionary model of social change considerably understates and substantially misconstrues the task in bringing about correctional stability and is too

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[3] There has been much theorizing about the causes of instability and about alternative strategies for stability. While the various theories, structural-functional analysis in particular, provide some initial direction for stability, criminologists have sensed the futility of attempting to develop a comprehensive theory on why only some prisons experience disorders. Insurrections in correctional institutions of virtually every combination, from traditional to modern, seem to make the incidence of riots almost independent of many of the variables commonly suggested, such as overcrowding and untrained personnel. These theories alone do not suffice for a general discussion on the role of correctional administrators in promoting or undermining institutional order because they ascribe few, if any, tangible roots to administrators in mandating appeasement policies designed to temporarily control inmate hostility.

[4] Perceptually, penal reform appears inexuricably linked with evolutionary development. The correctional literature indicates that "social evolutionary processes are slow; but in corrections they have been too slow. Our present almost catatonic inertia is unjustified; the dream of an efficient and humane correctional system is not an impossible one." Norval Morris and Gordon Hawkins, "Attica Revisited: The Prospect for Prison Reform," *Pyschiatric Annals,* March 1974, p. 23. For a historical study on the evolution of penological concepts, see Harry E. Barnes, *The Evolution of Penology in Pennsylvania* (Indianapolis: The Bobbs-Merrill Co., 1927).

[5] Bernard B. Berk, "Organizational Goals and Inmate Organization," *American Journal of Sociology,* March 1966.

[6] David Street, "The Inmate Group in Custodial and Treatment Settings," *American Sociological Review,* February 1965.

[7] Edith Flynn, "From Conflict Theory to Conflict Resolution: Controlling Collective Violence in Prison," *American Behavioral Scientist,* May-June 1980.

[8] Rudolph H. Moos, "Differential Effects on the Social Climates of Correctional Institutions," *Journal of Research in Crime and Delinquency,* January 1970, p. 80. Consistent with this line of thought is the concept of podular/direct surveillance in New Generation Jails.

[9] A change in correctional philosophy is considered to be one type of social change: the transformation of policy (goals and objectives) within a correctional system. Thus, the revolutionary march of social change leads to an almost inevitable alteration in correctional philosophy, affecting the social climate within an institution.

[10] David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown and Company, 1971). The prison was conceived as an alternative to violence. Despite this, the pervasive nature of violence in our prisons—rapes, killings, arbitrary physical abuse, and other forms of torture—is exemplified in the horrors of Attica and the penitentiary of New Mexico at Santa Fe.

[11] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon Books, 1977), p. 257. Also see Irwin's discussion on the change in social climate within correctional facilities due to the transition from the Big House to the correctional institution. Irwin, *op. cit.*

limited in its explanations of the sources of disorder. *Initiating* change, rather than adapting to change, is what is needed. Conceiving correctional stability merely as the management of change is incorrect.

Correctional officials, due to their failure to *initiate* change within a formal organizational framework, have perpetuated the physical, mental, and emotional deprivation of the two distinct strata within the prison setting—inmates and staff. Correctional authorities, through institutional policy, constitute the predominant force in determining the parameters for acceptable inmate and staff behavior and attitudes.

The origin and workings of informal institutional social organizations (i.e., inmate subcultures) illustrate this point. As Toch noted, informal inmate subcultures are a coping mechanism to ease perceived relative deprivations.[12] Excluded from formal organizational policy making, inmates respond to their "pains of imprisonment"[13] by forming inmate subcultures to maintain some degree of independence and autonomy. According to Goffman, [14] inmates become "prisonized." The correctional literature clearly indicates that prisonization is a function of structurally generated powerlessness[15] and intensified by a custodial orientation.[16]

To those most familiar with correctional institutions, inmate subcultures tend to be socially and ethnically homogeneous and grouped in terms of cleavages highly reflective of, and mobilized in response to, undesirable policies implemented by correction officials. Such inmate subcultures tend to be characterized by an intragroup solidarity and intergroup animosity.[17]

Achieving stability depends on altering the existing conditions of inmate powerlessness by involving inmates in policy making, thereby using the institutional framework to neutralize the social polarity and oppositional character of their subcultures. Working within the institutional mode would mold the inmates' behavior in a positive way granting them a legitimate means to redress their grievances. Institutional constraints and dictates of correctional authorities, in manipulating how much deprivation inmates experience, significantly structure inmates' socialization process.[18]

Correctional authorities are the conduits for internal reform by identifying goals and objectives, making sound choices for the organization, and providing the necessary framework to ensure input and social compliance from staff and inmate populations.

A plausible explanation for administration officials' failure at internal reform may lie in their current perceptions of unstable institutions. Clarifying the nature of stability demands an understanding of the underlying causes of instability. Herein lies the crux of the problem—the need for administrators with institutional experience and correctional expertise. As I have indicated elsewhere,[19] empirical evidence illustrates the hazards associated with ill-qualified administrators.

Proper correctional leadership and administration have been issues of considerable relevance and cogence, yet questions about administrative qualifications remain, and, in fact, become more pressing as ill-qualified administrators establish themselves within our correctional institutions. During a recent interview, the president of the American Association of Correction Officers stated that "we need qualified, certified administrators" and blamed the political appointment process for the lack of experienced directors and wardens.[20] Recognizing ill-qualified administrators and the political appointment process as major impediments to correctional reform is a step in the right direction and is likely to foster a multitude of recommendations of strategies for dealing with institutional instability.

However, discussions about institutional instability continue to center almost exclusively on the inevitability

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[12] Hans Toch, *Living in Prison: The Ecology of Survival* (New York: Free Press, 1979). The effects of prison social climates are brought to bear not only on inmate populations, but on the institutional staff as well. For an informative discussion on officer subculture, see David Duffee, "The Correction Officer Subculture and Organizational Change," *Journal of Research in Crime and Delinquency*, July 1974.

[13] See Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton, New Jersey: Princeton University Press, 1958).

[14] Erving Goffman, *Asylums* (Garden City, New York: Doubleday Anchor Books, 1961).

[15] Charles W. Thomas and Matthew T. Zingraff, "Organizational Structure as a Determinant of Prisonization: An Analysis of the Consequences of Alienation," *Pacific Sociological Review*, January 1976.

[16] Elmer A. Spreitzer, "Organizational Goals and Patterns of Informal Organizations," *Journal of Health and Social Behavior*, March 1971.

[17] The once widely held view of a unitary inmate subculture composed of a set of comprehensive values is no longer accepted by many criminologists. Inmate subcultures are homogeneous in terms of the various ethnic and social groupings which appear to bind inmates together. See James B. Jacobs, *Stateville: The Penitentiary in Mass Society* (Chicago: University of Chicago Press, 1977).

[18] It should be noted that while not totally negating the value of the deprivation model (closed system paradigm), there is yet another dimension emphasizing a competing and wider approach to the development of inmate subcultures—the so-called importation model. That is, inmate pre-prison characteristics (their diverse attitudes and values external to the prison) are imported and established in the prison social system. See Charles W. Thomas and Samuel C. Foster, "The Importation Model Perspective on Inmate Social Roles: An Empirical Test," *The Sociological Quarterly*, Spring 1973. Furthermore, researchers may incorporate both the deprivation and importation models into an overall model for inmate subcultures. See James B. Jacobs, "Stratification and Conflict Among Prison Inmates," *Journal of Criminal Law and Criminology*, December 1975; Barry Schwartz, "Pre-Institutional v. Situational Influence in a Correctional Community," *Journal of Criminal Law, Criminology and Police Science*, December 1971.

[19] A major problem confronting correctional institutions today is the system of appointing ill-qualified administrators through political patronage. Partisan politics, not professional competence, is the basis upon which questionable appointments are made. Ill-qualified politically appointed administrators, by virtue of their positions in authority, can become a destabilizing force, engendering staff frustration, inmate deviance, and organizational instability. Given this specificity, the incidence of ill-qualified administrators is seen as a political option in and of itself, instead of merely a consequence of other political options that are equally important contributors to penal problems (e.g., insufficient budgets). See Salvatore Cerrato, "Politically Appointed Administrators: An Empirical Perspective," *Federal Probation*, March 1984.

[20] Interview with Robert Sahajdack. *Corrections Today*, July 1985, p. 37. There is a serious need for more scholarship on the selection and career paths of correctional officials. Partisan politics in the appointment of correctional officials has caused much concern. See Roger Morris, *The Devil's Butchershop* (New York: Franklin Watts, 1983); Jacobs, *Stateville: The Penitentiary in Mass Society*, *op. cit.* A viable way to improve management selection procedures for a target position is through an assessment center. An assessment center utilizes extensive job/task analysis identifying job-related behavior necessary for effective functioning in key management positions by stimulating actual on-the-job performance. See Jerry A. Nosin, "Assessment Centers for Management Selection," paper presented at the 1985 Annual Meeting of the American Correctional Association, New York, August 1985.

of social change and a resulting change in correctional philosophy. Accordingly, correctional instability is treated as if it were temporary; and unstable institutions are seen as characterized by "gaps" between their current punitive features and the progressive correctional philosophy of stable institutions. It is no longer enough if, indeed, it ever was, to "explain" correctional stability simply in terms of social change.

The Reform Process in Unstable Institutions

Recognizing the Problematic Nature of Change

Despite the optimistic theories for reforming unstable institutions, correctional stability has proved elusive. The "gaps" between stable and unstable institutions seem to be widening—not simply because the former are modern, innovative, and functional—but because the latter are stagnating, becoming more custodial in nature. In contrast, some institutions constantly revise their policies and keep them current and consonant with changing conditons.[21]

Generally, social change affecting corrections has been fitful.[22] Far from being inevitable and ultimately altering correctional philosophy, social change is sporadic, erratic, and unpredictable in its consequences. In turn, resistance to change seems to be as ubiquitous as the need for change itself. Correctional policies are generally conceded to have strong conservative biases which stress bureaucratic conformity, a manifestation of the ever-present need for security that is so outstanding a feature of corrections. However, bureaucratic conformity actually becomes a major source of insecurity by promoting measures that reduce the adaptability of our institutions to change.

There is a tendency to discuss the effects of social change in corrections, at least implicitly, in very holistic terms. This approach depicts social change as the replacement of the entire traditional correctional structure and philosophy with an innovative and modern model based on treatment. The problem of achieving stability is reduced simply to the construction of innovative and modern correctional institutions. Such a depiction of change tends to gloss over its unpredictable nature.

Traditional correctional institutions are affected by change at different rates. Indeed, implicit in American corrections is what Fogel aptly called "uneven levels of development."[23] Likewise, Hawkins asserted "progress has not been uniform in all of the prison systems in the United States. It was acknowledged that there were black spots and that there had been delays and even regressions."[24]

The fact that some institutions are affected by social change does not mean that all institutions are. Some are virtually unaffected; some marginally affected; others more intensely affected. Irwin noted that, "prisons in the East, Midwest, and West were touched (most lightly, some belatedly, and a few not at all) by the humanitarian reforms of the'progressive era.' "[25]

Social change can even affect parts of the same institution at differential rates. Old and new philosophies can exist side by side. For example, custodial and treatment-oriented ideas often exist coterminously and coequally within a given institution at any given time.

The erratic character of social change as it affects corrections is manifested in other ways as well. While the transition from traditional institutions to modern institutions is often depicted in terms of the emergence of a correctional philosophy coterminous with a humanitarian ideology, social change can produce contemporary humanitarian groups in opposition to their traditionally distinct counterparts.[26] Such contemporary humanitarian groups may be limited in membership and

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[21] Prisons function at different levels of tolerance depending upon the administrative hierarchy. There exists substantial differences among correctional officials in attitudes and approaches regarding inmate needs. At one end of the ideological spectrum, there is the view that a drastic reordering of institutional policy is likely to be effective in dealing with inmate needs. The common denominator that characterizes most of the competing approaches to the above is to attach little importance to the possibilities of restructuring and to deemphasize changes in institutional policy (i.e., custody vs. treatment). The deleterious effects of a lack of concern for inmate needs have become so blatantly obvious that correctional officials and staff perceptions of inmates vary from one institution to another, to the extent that each institution becomes a unique one in terms of quality and quantity of facilities and staff. For example, Duffee found that prisons differ in their social climates and in the relative importance attached to the goals of rehabilitation and reform. See David Duffee, *Correctional Policy and Prison Organization* (Beverly Hill, California: Sage Publishing Co., 1975), pp. 172-174.

[22] This is particularly true of juvenile correctional facilities (training schools). Because of the problems found within such institutions, training schools were closed throughout the entire state of Massachusetts. To date, both Vermont and Utah have adopted a similar policy. For an interesting discussion on variations in standards among juvenile justice facilities, see Barry Krisberg, Paul Litsky, and Ira Schwartz, "Youth in Confinement: Justice by Geography," *Journal of Research in Crime and Delinquency*, May 1984. Also, there is a lack of uniformity in the evolution of attitudes regarding the confinement of children and the mentally disturbed in adult institutions. Pennsylvania is the only state which has completely removed juveniles from adult jails.

[23] David Fogel, "The Politics of Corrections," *Federal Probation*, March 1977, p. 27. Ryan "noted that progressive leaders in New York, Massachusetts, and a few other states made efforts to provide humane care and treatment for female offenders in the early 1900's. However, this generally was not the case in other parts of the nation." T. A. Ryan, *Adult Female Offenders and Institutional Programs: A State of the Art Analysis*. U.S. Department of Justice, National Institute of Corrections, February 28, 1984, p. 4.

[24] Gordon Hawkins, *The Prison: Policy and Practice* (Chicago: University of Chicago Press, 1976), p. 1. It should be noted that Federal court intervention into correctional affairs has produced a wide disparity of correctional standards across the country. That is, a Federal district court ruling only affects conditions in correctional institutions located within that Federal district, and Federal district court decisions involving similar issues may differ among districts.

[25] Irwin, *op. cit.*, p. 2. In discussing the application of the general doctrines of civil death and universal citizenship to the status of inmates in state prisons, Cox and Speak observed that "states of the southeast and far west tend to operate prison systems under civil death assumptions. Those of the northeast and upper midwest tend more toward the citizenship perspective." George H. Cox, Jr. and David M. Speak, "Contemporary Doctrines of 'Civil Death,' " paper presented at the 1984 Annual Meeting of the Academy of Criminal Justice Sciences, Chicago, Illinois, March 29, 1984, p. 3.

[26] A working party of the American Friends Service Committee published a report on crime and punishment in America entitled "The Struggle for Justice." In that report, according to Morris and Hawkins, "today's Quakers condemn their predecessors with the peculiar ferocity characteristic of relations within family groups, noting unkindly that 'the horror that is the American prison system grew out of an eighteenth-century reform by Pennsylvania Quakers.' " Morris and Hawkins, *op. cit.*, 29.

Nils Christie, a Norwegian criminologist, suggested that alternative sanctions to imprisonment not be used for the same purpose as that of imprisonment—to inflict punishment—indeed, a radical shift in philosophy from that of other humanitarian reformers who feel alternatives to imprisonment should be as punitive in nature as imprisonment itself. See Nils Christie, *Limits to Pain* (Oxford: Martin Robertson, 1982).

interest and only intermittently linked to other humanitarian groups. The differences are in degree and not in substance. The effectiveness of these groups is limited by their tendency to splinter into less effective subgroups. That is, there has been not so much a cohesive movement as a collection of movements among humanitarian groups. Irwin wrote,

> Many private groups still work on prison reform, and the major issue that tie most of them together is the prison construction moratorium . . . The idea binding the different individuals and groups together is that prisons are horrible and counterproductive. This ends their agreement.[27]

Social change can function to develop new contemporary reform groups and strengthen or weaken specific traditional groups. However, it does not necessarily erode traditional ideologies and may, in fact, create a variety of new ideologies. Social change does not automatically bring about institutional change!

Another point must be emphasized. Observers of unstable institutions may tend to accept the prevailing punitive ideology as traditional and, hence, as more or less given. That is, the form in which ideology manifests itself is decreed by tradition, and it is in terms of such *givens* within which the problems of attaining progressive reform must be addressed. In effect, the more persistent and severe the traditional punitive ideology, the less is the perceived chance of success in reform efforts.

Social change can produce and transform ideology, but the effect of ideology nonetheless is limited in the practical sphere of institutional reform. Ideological reform groups, whether traditional or modern, do not inevitably lead to strategies for change. Moreover, a group's definition of its own interests and identity can alter radically within changing social and political conditions. Irwin noted that between 1967 and 1971, "many people's perceptions and definitions of crime, criminal justice, and the prison changed."[28] In fact, some existing reform groups "influenced by the infusion of new left activities and radical ideologies, became more radical in their goals and strategies."[29]

Group consciousness tends to be the product of ideological mobilization. The definition of the group and of its interests after such mobilization may vary considerably from what might have been predicted simply on the basis of a survey of the social characteristics of its members. In other words, reform groups and their interests tend to be vaguely defined and only become explicit and articulated in response to social change.

The Role of Reformers

The "malleability" of social and reform ideology is emphasized because it points to another force affecting unstable institutions and an important force in corrections: reformers. The term "reformers" is a catchall used to describe social groups, concerned with correctional issues, who foster alternative sets of goals and objectives. Such groups are not a distinct, cohesive social category; they are crisscrossed by cultural, ethnic, economic, and humanitarian affiliations. These groups tend to be initiators in the correctional process and have considerable latitude in their efforts to change institutional policy. In this context, Cohn makes the following observation:

> Corrections. . . has engaged in some effort to bring about change. However. . . the mandate for change generally has come more from external sources. . . than from internal sources. Certainly, too little change has been inaugurated by top management. Nevertheless, this pursuit for reform comes from a recognition by many that corrections had failed: failed to correct clients, failed to protect society, failed in general effectiveness, and failed at being efficient in its operations.[30]

At this point we should ask if there is any support for social participation in penal institutions. Do reform groups aid or hinder the correctional process? In defense of wider social participation, I maintain that correctional philosophy benefits greatly from general discussion and input by reformers outside of government circles. If education can be said to be too important to be left to educators, so corrections is too important to leave to correctional authorities. Reform groups can influence correctional authorities, who provide correctional institutions with leadership and legitimacy. Indeed, correctional authorities are influenced, both directly and indirectly, by networks of individuals and groups with an inordinate degree of power. Arguably, a major challenge to correctional authorities comes from the dynamics of the reform movement, particularly the growth of programs and policies advocated by these various groups. Insofar as deliberate change in policy takes place, it does so largely as a result of pressure exerted on correctional authorities by "outside" groups.[31]

The tendency toward ideological fragmentation (infighting) among reform groups has limited their ability to develop a viable power base. An example of this is the ideological division between reformers maintaining the need for prisons (Norval Morris, David Fogel)—provided they operate within the confines of the Constitution—and radical reformers advocating the abolition of the entire prison system (David Rothman, Jerry Miller). The

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[27] Irwin, *op. cit.*, pp. 222-223.

[28] Ibid., p. 160.

[29] Ibid., p. 90.

[30] Alvin M. Cohn, "The Failure of Correctional Management Revisited," *Federal Probation*, March 1979, p. 10. It should be noted that while the prime vehicle in reform of correctional conditions since 1971 has been the Federal courts—see Holt v. Sarver, 309 F. Supp. 362 (Eastern District of Arkansas, 1970)—judicial intervention in changing prison conditions has declined in deference to the expertise of new (college educated) administrators. See Elizabeth Alexander, "The New Prison Administrator And the Court: New Directions in Prison Law," *Texas Law Review*, (56), 1978.

[31] For a discussion on the way various groups influence correctional officials, see Lloyd E. Onlin, "Conflicting Interests in Correctional Objectives," in Richard A. Cloward et al. (eds.), *Theoretical Studies in Social Organization of the Prison* (New York: Social Science Research Council [Pamphlet 15]), March 1960, pp. 111-129.

continuance of these groups and their movement is dependent on the willingness and capabilities of reformers to unify their various fragmented and intensified ideologies.[32] Currently, their ability to coalesce is limited by the prevalent social patterns (e.g., pronouncements of decline in the rehabilitative ideology, the tolerant attitudes of the 1960's being replaced by the emergence of a conservative attitude emphasizing a punitive philosophy, and the broad conservative consensus coming from such institutional bases as the Supreme Court led by Chief Justice Burger). Thus, the mobilization of reform groups is countered, particularly in light of the mounting national fear of crime, by a broad movement toward, and interest in, greater punitive policies including the death penalty.

This discussion of reform groups has remained purposely general. No one group of reformers has been emphasized. The various groups in the reform movement are viewed as discrete organizations. That is, they are seen only as seeking to carry out goals consistent with their interests and capabilities. Certain groups become the dominant element in the reform movement because they are well organized, have political clout, and are able to mobilize widespread favorable opinion through their use of mass communication.[33] Groups that attain such recognition in the reform movement are relatively few in number, and institutional policy change seems to evolve in response to their actions.

Correctional reform risks opposition that may be far greater than the degree of support the reformers could muster. Thus, correctional authorities cannot be expected to sustain the reformers' initiatives. The movement from instability toward stability in corrections is, in part, the reform of factions, of ideology. According to Miller, ideology is "a central element in the complex patterns of change and stability, and a key to their understanding."[34]

Change in Administrative Ideology

As previously indicated, many correctional authorities view "stability" within their institutions, at least implicitly, as the practice of inmate conciliation. Recurrent patterns of inmate uprisings have taken their toll on "stability" and led to maintaining "order." There must be a discernible shift in mood among correctional authorities. They have perpetuated a tenuous system of governance based on a relationship between inmate appeasement and order (e.g., social control predicated upon unstable accommodations between administrators and inmates).[35] In penal institutions such a relationship can be vacuous. Bates and Thompson cautioned, *"Peace by appeasement* can, and sometimes does, lead to disturbances, riots and bloodshed."[36] (Italics mine).

Through constant placation, the inmate is reduced to the status of an "object," something less than a human being. The correctional literature indicates that "the extent of which an institution is able to reduce its inmates to the status of 'objects'. . .determines the institution's potential for violent eruption."[37] Administrative concern to present a guise of stability falls victim to the practice of inmate appeasement, which is, at best, a temporary panacea to repress inmate hostilities. In an effort to terminate the April 1952 riot at the State Prison of Southern Michigan, "part of the process included the promise of a dinner of 'steak and ice cream' after the inmates surrendered."[38] Under the general rubric of "inmate appeasement," stability—as a consequence of the emphasis on order—becomes a secondary and often unrealized goal.

Placating irate inmate populations poses a direct and dangerous challenge to our current penal doctrines. Heterodox policies develop *not* because of an adherence to basic penal philosophy, but to satisfy inmate discontent and silence public outrage. Recent experience demonstrates that within an unstable institution a riot is likely to occur in almost any kind of conflict situation. Although specific features of a prison determine the timing, the "actors," and the demands, unstable institutions are characterized by the expansive nature of conflict. In such an environment, turmoil becomes the norm rather than an aberration.

In the current debate concerning unstable institutions, administrators are at the center of a dynamic confrontation between reform groups seeking social change and strong anti-reform forces in favor of maintaining punitive ideologies. The discretion accorded correctional authorities in decisionmaking makes them, in a definitive sense, gatekeepers of the status quo and the most vehement antagonists to various group intrusions and interferences. When correctional philosophy is arrested in the face of social change, institutional conflicts are likely to increase. For internal reform to occur in a positive fashion, correctional philosophy must reflect the tempo of the times. For instance, during the October 1952 riot at the Tren-

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[32] A case in point: The National Coalition for Jail Reform, where through consensus many divergent groups work together to achieve chosen goals.

[33] Lloyd E. Ohlin, "Conflicting Interests in Correctional Objectives," in Richard A. Cloward et al. (eds.), *op. cit.*

[34] Walter B. Miller, "Ideology and Criminal Justice Policy: Some Current Issues," *Journal of Criminal Law and Criminology*, June 1973, p. 142.

[35] As Morris and Hawkins put it, "Violence. . .has been contained, insofar as it has been contained, only by a complicated series of implicit contractual relationships between the leaders amongst the prisoners and the administration." Morris and Hawkins, *op. cit.*, p. 23.

[36] Sanford Bates and Craig Thompson, "The Trouble with Prisons is Politics," *Saturday Evening Post*, May 14, 1955, p. 111.

[37] Catherine Douglas, Joan Drummond, and C. H. S. Jayewardene, "Administrative Contributions to Prison Disturbances," *Canadian Journal of Criminology*, April 1980, at p. 202. Another proposition appended to this argument is the slogan announced by inmates during the Attica insurrection—"if we cannot live like people, let us at least try to die like men."

[38] Vernon Fox, "The Politics of Prison Management," *Prison Journal*, Fall-Winter, 1984, p. 109. A Detroit newspaper called the settlement "a deplorable and disgraceful concession." John B. Martin, *Break Down the Walls* (New York: Ballentine Books, 1951), p. 99.

ton State Prison, the inmate negotiating committee stated, "We're not asking for no hotel. Give us the same thing they have in federal prison."[39] An increased awareness of the possibilities of future instability has forcefully directed our attention to the underlying dynamics of administrative decisionmaking; new methods of initiating and implementing effective correctional policies are needed. This idea is reinforced by an increasing number of penological studies focusing on the role of administrators. Mahan noted that "administrators of the state department of corrections in New York and New Mexico were involved in the development of unstable and inconsistent policy for the prisons."[40] Further observations suggest that correctional administrators through their policies can create occupational stress in correctional officers[41] and increase the potential for institutional violence.[42] Correctional officials must pay close attention to how their policies affect the institutional environment; the greater the awareness of the social system existing within an institution, the more sophisticated the strategies for policy implementation. Bartollas and Miller pointed out:

> Administrators who have failed to conceptualize the total organization [of their institution] are likely to end up with crisis centered management. This means they will spend most of their time 'putting out fires.'"[43]

Since correctional policies do influence the social-organizational structures within an institution, we are able to infer how the organizational effects of one type of policy commitment compare with those of another.[44] It is, then, incumbent upon correctional authorities to exercise flexibility and use a wide range of policy options (e.g., participatory management) to realign correctional priorities and practices in ways that depart from existing traditional organizational arrangements. The focus should be to develop an institutional climate receptive to the appropriate needs and services required of those within the institution. Inmate and staff participation in the formal structure of the institution is crucial to this process, since their exclusion from policy making contributes to a state of disorder.[45] Irwin maintained, "we need a new system of control over prisoners. . . . A formal system of decision making in which all diverse parties (prisoners and guards included) have some input and in which the conditions of work and confinement, the rules of the institution, and the special problems and grievances of different parties (individuals and groups) are negotiated."[46] In all likelihood, administrators will tenaciously oppose such changes because the reforms tend to undermine their role as powerful determiners of correctional policy. The new strategies would require administrators to acknowledge a diminution of authority.

Achieving stability within a correctional facility demands a degree of compliance and participation on the part of its discrete "actors"—inmates and staff. They are internal social factors that must be recognized by correctional authorities in the search for that elusive goal—institutional stability. Correctional authorities must realize that negative reactions toward institutional policy, particularly by inmates, exacerbate lawlessness and violent expressions of inmate bitterness signaling a condition of entropy.[47] The ability of any correctional facility to maintain a state of stability rests on the actors' ability to engage in institutional policy making, to acknowledge that their participation is yielding results, to maintain control over their individual identities, and to articulate their diffuse feelings of perceived inadequacies. The obvious difficulties in achieving this multiple agenda explain such of the conflict that appears in unstable institutions.[48]

Without internal reform in unstable institutions, inmate hostility will reach unprecedented proportions and

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[39] G. David Garson, "The Disruption of Prison Administration: An Investigation of Alternative Theories of the Relationship Among Administrators, Reformers, and Involuntary Social Service Clients," *Law and Society Review*, May 1972, p. 543.

[40] Sue Mahan, "An 'Orgy of Brutality' at Attica and the 'Killing Ground' at Santa Fe: A Comparison of Prison Riots," in Michael Braswell et al. (eds.), *Prison Violence in America* (Cincinnati, Ohio: Anderson Publishing Co., 1985), p. 83.

[41] Lucien X. Lombardo, *Guards Imprisoned: Correctional Officers at Work* (New York: Elsevier North Holland, Inc., 1981); Frances E. Cheek and Marie DiStefano Miller, "The Experience of Stress for Correctional Officers: A Double-Bind Theory of Correctional Stress," *Journal of Criminal Justice*, Volume 11, Number 2, 1983.

[42] Morris and Hawkins, *op. cit.*

[43] Clemens Bartollas and Stuart J. Miller, *Correctional Administration: Theory and Practice* (New York: McGraw-Hill, 1978), p. 115.

[44] Duffee, *Correctional Policy and Prison Organization*, *op. cit.*

[45] The informed reader will note literature references of instability resulting from proactive change in correctional policy. McCleery, in a brilliant discussion of a prison's transition from a traditional custodial environment to a progressive rehabilitative one, opened up channels of communication between inmates and top administrators—the result of appointed new liberal administration. This upset the existing social equilibrium by undermining traditional values within the prison. This should come as no surprise for *"the seeds of institutional revolution were contained in the appointment of five new staff members without previous penal experience."* (Italics mine.) Richard McCleery, "Communication Patterns as Bases of Systems of Authority and Power," in Richard A. Cloward et al., (eds.), *Theoretical Studies in the Social Organization of the Prison*, *op. cit.*, p. 62. Despite the virtual explosion of idiographic research on highly specific conditions that promote correctional disorder, ill-qualified administrators have in a very real sense become the very definition of instability. They can adversely affect positive reform by failing to recognize and deal effectively with the unique institutional responses brought by the strains of reforms. In other words, they lack perceptiveness—the insight necessary to project oneself directly into a situation. Instead, instability is seen more as being a break with past order—the disruption of the inmate social structure—than as an emotional response to the disruption of that order.

[46] Irwin, *op. cit.*, p. 241.

[47] Inmate radicalism is often a manifestation of the lack of "internal" avenues available to manage the inmates' conditions of confinement. Instability appears to be the most effective method available in addressing inmate concerns to ameliorate abject penal conditions. Also, recognition of the role of staff, particularly the correctional line officer, in the disruption of the prison milieu often leading to the discharge of administrators has been acknowledged. See Donald R. Cressy, "A Confrontation of Violent Dynamics," *International Journal of Psychiatry*, September 1972. Any administrative disregard for staff and inmate concerns carries an ominous potential of its own, that is, the concomitant of instability. The operational pattern of an institution becomes one of moving relentlessly from crisis to crisis.

[48] During my tenure as a correction officer, I had observed firsthand that correctional authorities often contemptuously stigmatize inmates as well as correction officers as "inferiors." Such a perception greatly inhibits their participation in decisionmaking, while negatively affecting compliance necessary for some semblance of internal stability. Manifestly, such a particularly broad generalization has obvious limitations. Personal prejudices, affecting my style of argument, preclude further discussion. More fundamental, however, is the problematic nature of correctional authorities to engage in dialogue with inmates and staff over policy. A careful scrutiny of institutional policies by these "actors" will raise serious questions about administrative competence and for reasons of self-interest, correctional authorities refrain from communicating with inmates and staff.

lead to progressively higher levels of inmate appeasement in a dire attempt to regain some semblance of order. For example, during a 1981 riot at a New Jersey correctional facility, the administrator in charge of negotiations lamented, "We've given you guys everything you want....You're milking us now."[49] These practices have an enormous impact on institutional expenditures. Thus, the force of public review may eventually offer the best hope of imposing constraints on a questionable system of control that relies continuously on short-term crisis management.[50]

In any event, correctional authorities ultimately must be judged on their ability to maintain control over the prison organization. Given an unstable institution, administrators have a choice: institute change to achieve stability or attempt to maintain order through whatever means available. At the heart of the crisis in unstable institutions is an inability to make the stronger choice. Perhaps, as Morris asserted, "correction has attracted too many second-class minds who have provided timorous and vacillating leadership."[51]

Conclusions and Proposals

While our discussion suggests that the optimism generated by the notion of social change as a catalyst for stability is both simple and pervasive, specific trends in corrections (e.g., persistent patterns of instability, uneven levels of reform, and the like) have seen a decline in such optimism. Although social change may act as a catalyst for reform, it does not automatically and effectively bring stability to penal institutions. As Hawkins noted,

> the origins of imprisonment are lost in antiquity. It has proved to be the most perdurable of all penal methods, despite all the premature obituary notices. It is quite possible that eventually the maximum-security prison as we know it will be replaced by Playfair and Sington's small non-punitive custodial centers, psychiatrically and/or sociologically based, and adapted to individual needs. But it is surely both a perverse denial of experience and totally irresponsible to abjure attempts to deal with present problems because of the prospect of an imagined futurity.[52]

Nevertheless, this conceptualization of social change continues to cloud the discussion of penal reform, thereby obscuring a major source of instability—ill-qualified correctional authorities. The relationship between ill-qualified correctional officials and the emergence of inmate insurrections seems clear. The 1968 riot at the Oregon State Penitentiary becomes comprehensible in terms of the "lack of leadership at the 100-year-old institution."[53] Order was restored at this facility when prison and state officials promised the inmate negotiating committee that a national search would be undertaken "to find a 'top-flight' new penitentiary warden."[54]

In 1953, the American Prison Association appointed a special committee on riots, which reported that riots "should be looked upon as costly and dramatic symptoms of faulty prison administration."[55] Nearly three decades later, the American Correctional Association indicated that an inept administrator is a significant factor contributing to institutional riots.[56] However, one caveat must be mentioned. Since prison riots have been identified as political events.[57] there is a tendency to "explain" the causes of riots in a manner that serves an explicit ideological function. In other words, explanations are formulated so as not to embarrass those whose careers seemingly hinge upon the political winds.[58] The extent to which committees appointed to investigate institutional disturbances have chosen to officially identify the "true" source of disorder is negligible. Anecdotal information suggests that official reports outside the domain of professional criminological inquiry are of questionable validity. A concomitant view comes from Fox:

> Investigating committees from Governor's offices, legislatures, or other political directions seek simplistic answers that seem to structure their interests in accordance with the best interests of their own identifications...the real causes of riots must be tempered pending corroboration from other sources.[59]

Tangible evidence of this lies in the Report of the Attorney General on the February 1980 riot at the Santa Fe Penitentiary in New Mexico.[60]

Many ill-qualified administrators enter the field of corrections not from any long-standing desire, but from happenstance (appointment) based on their political sponsorship. For instance, members of the Boston City Council attempted to unduly influence the appointment of a candidate for the position of Deputy Commissioner of Corrections. Their candidate "knew little about prisons. His qualification was that he ran a local union of teamsters."[61] The 1937 Illinois Prison Inquiry Commission illustrated the inefficiency of the spoils system.

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[49] Lee Keough, "We'll Last Until Death," *The Herald News*, October 22, 1981, p. 1.

[50] Administrative policies which are fiscally unsound can persist only as long as the "rules" for the administration remain inaccessible to the general public.

[51] Norval Morris, "From the Outside Looking In: Or the Snail's Pace of Penal Reform," in *Outside Looking In—A Series of Monographs Assessing the Effectiveness of Corrections* U.S. Department of Justice, Law Enforcement Assistance Administration, April 1, 1970, p. 29.

[52] Hawkins, *op. cit.*, p. 44.

[53] "700 Convicts Riot at Oregon Prison," *The New York Times*, March 10, 1968, p. 53.

[54] Lawrence E. Davies, "Oregon Convicts Win Concessions: Revolt Ends, Guards Freed," *The New York Times*, March 11, 1968, p. 24.

[55] Martin, *op. cit.*, p. 222.

[56] American Correctional Association, *Riots and Disturbances in Correctional Institutions: A Discussion on Causes, Preventive Measures and Methods of Control* (College Park, Maryland, 1981).

[57] Frederick J. Desroches, "Anomie: Two Theories of Prison Riots," *Journal of Criminology*, April 1983.

[58] Following the 1980 prison riot in New Mexico, the House Minority Leader of the New Mexico Legislature lamented, "If the people hired or appointed to run those facilities are not capable of doing it, it reflects very directly on the administration that appointed them." Roger Morris, *op. cit.*, p. 192.

[59] Vernon Fox, "Why Prisoners Riot," *Federal Probation*, March 1971, p. 9.

[60] See Roger Morris, *op. cit.*, pp. 197-198.

[61] Bates and Thompson, *op. cit.*, p. 23.

> The success or failure of a sound prison program rests upon the personnel selected to administer the system. The practice seems to be that with each new incoming administration, the personnel of our prison changes. This is due largely to the fact that a great number of positions in the penal system become available for political patronage regardless of the individual qualifications for the job. As a result, one can scan the pages of Illinois history and find that in nearly every administration that has been some major uprising in the penal system, riots, causing a loss of many lives and the destruction of much state property.[62]

In discussing the failure of correctional officials to provide adequate services affecting inmates' living conditions—improvements that are easily within the officials' power to offer—the executive director of the John Howard Association convincingly observes:

> An interesting measure of the inhumanity of prison life appears in what prisoners are asking for today. If you examine prison riots, such as Attica, New Mexico, and the 1979 takeover at death row at Stateville...what prisoners are bargaining for are basic human rights...they aren't asking for a 747 to leave the country or a million dollars to go to Africa. They aren't asking to make prisons into a Holiday Inn. But they are asking for safety, adequate food, showers, access to the law library, sufficient recreation, and more time out of their cells....[63]

An equally striking rendition is found in the August 1968 riot at the Ohio Prison where inmates demanded "reform of living conditions and regulations."[64] Correctional officials have a great deal of flexibility, without constraint of fiscal austerity, in their policies and regulations to reduce the severity of inmate living conditions and to ensure them a decent level of existence[65]—for instance, better food, library and television privileges, review of force used on inmates by custodial staff, and environmental concerns such as reduced noise levels and improved sanitation. Schrag[66] has indicated that correctional authorities attribute prison riots to contributing factors outside of their control, especially overcrowding and insufficient budgets. These pronouncements have proven to be largely unsatisfactory from the perspective of inmates who participated in institutional disturbances.[67] Their most vocal demands were dependent upon the action/inaction of officials within the system, despite the claims correctional officials may try to convey to the outside world.

Is stability, then, an impossible dream? Given the ideological fragmentation of the reform movement, the weak association between social change and stability, the multitudinous pressures on prison administrators, the violence engendered by inmate discontent, and ill-qualified administrators, can anything be done to bring correctional institutions to a condition of stability? This is a difficult problem, which demands creative thinking and experimentation. The following proposals, although not unique to the present study, suggest possible solutions:

1) The correctional system with aid from academic and socially concerned groups should develop a concrete philosophy of reform with goals and objectives that can realistically be met.

2) The correctional system should muster the administrative resources necessary to meet these realistic goals and objectives, including reform groups with philosophies that dovetail with those of the administration, staff members trained in problem-solving, and inmate input into the process.

3) Administrators should adhere consistently and firmly to the goals and objectives developed by the above mentioned process. In this way, placation can be eliminated as a strategy for stability. Inmate input is crucial to the process outlined here, but constant placation of new inmates contributes to chaos. Updating goals as new situations arise is a rational solution. Placation is not.

4) State authorities should make certain that administrators are selected and their performance judged on the ability to develop and implement concrete, realistic policies of reform. Administrators must acquire the skills associated with change rather than those required to maintain the system. Political appointment of administrators weakens the reform process, creates confused leadership, and shifts the concern of the administrator from establishing stability within the institution to juggling the various demands of political pressure groups.

5) Finally, administrators should establish and *rigorously* maintain a policy of reform which *includes* inmates, not *excludes* them. Inmates react to policies which increase their "pains of imprisonment" by periodic eruptions of instability. A promise is a promise and must be treated as such. Inconsistant leadership creates turmoil, and turmoil leads to dangerous disruption.

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[62] Illinois Prison Inquiry Commission, *The Prison System in Illinois* (Springfield, 1937), p. 591. Quoted in Jacobs, *Stateville: The Penitentiary in Mass Society*, *op. cit.*, pp. 20-21.

[63] Clemens Bartollas, *Introduction to Corrections* (New York: Harper and Row, 1981), pp. 62-63. Moreover, as a noted penal authority suggests, the list of inmate demands following a prison riot tends to be quite reasonable. See Irwin, *op. cit.*, p. 151.

[64] "500 Guardsmen and Police Storm Ohio Prison," *The New York Times*, August 22, 1968, p. 45.

[65] Correctional officials make decisions affecting inmate populations—needs and rights issues—that require the maximum amount of correctional expertise. This has been recognized by the courts. For instance, a Federal judge may allow correctional officials, particularly in a conditions case, to exercise their own discretion in remedying constitutional violations. See *Hutto v. Finney*, 98 S. Ct. 2565 (1978). The cumulative effect of administrative policies that fail to address inmate needs may constitute cruel and unusual punishment. See American Civil Liberties Union Foundation, *The National Prison Project Status Report—The Courts and Prisons*, December 1, 1983.

[66] Clarence Schrag, "The Sociology of Prison Riots," Proceedings of the 19th Annual Congress on Correction of the American Correctional Association, Denver, Colorado, 1960, p. 137.

[67] *Ibid.* The main causal factors cited by inmate participants in institutional riots were "bad food, oppressive or inconsistent discipline, expressions of staff vengeance against inmates, racial antagonism. . . ." p. 137.

The Management and Treatment of Institutionalized Violent Aggressors

BY H.R. "HANK" CELLINI, PH.D., C.R.C

*Correctional Program Specialist, National Institute of Corrections, National Academy of Corrections, Boulder, Colorado**

SECURITY AND treatment personnel are united in the desire to minimize the frequency and intensity of institutional violence. The purpose of this article is threefold: 1) to discuss the various concerns of the institutional security staffs in the crisis intervention and long-term management of violent aggressors; 2) to provide policy and program direction for the facility administrator; and 3) to offer some direction for clinicians in the development of treatment programs for this population. With some small modifications, the information provided can be applied to prisons, mental hospitals, and forensic treatment units.

Management of Violent Behavior

The primary concern of all staff within an institution should be the management of disruptive behavior. Therefore, the dictum is concern for management first then concern for treatment. The most pressing concern of management is the emergent crisis when one or more individuals is threatening or actually engaged in a life endangering situation. Usually the people on hand or at least the first to be called are the security personnel. The next section of this article therefore discusses how security personnel may improve their handling of these difficult situations.

Crisis Intervention

Violent acting out persons are often frightened of their own urges and want help in preventing loss of control. These people frequently feel helpless to control or alter the frustrating events in their lives, and because of this feeling of helplessness, they act out to alleviate the feeling and consequently hurt others in the process.

The following crisis intervention techniques are designed to use to de-escalate violent scenarios. If the following strategies do not work, then it is necessary to resort to the restraint procedures taught by your security personnel. If any of the following guidelines are different from instructions given to you when you were initially trained for your present position, please consult your supervisor before implementing these guidelines.

1) *Provide a clear chain of command.* One person must be chosen in advance to control the situation. In prisons this tends to occur naturally by considering the rank of the correctional officers. In facilities where some of the personnel wear civilian clothing, it will be important to determine policy and procedures beforehand during staff preservice training.

2) *Remove unnecessary bystanders.* The more people who are around, the more the ability to control the violent scenario will be decreased. Therefore, it is necessary to remove any additional staff, inmates, or other bystanders from the immediate environment. Make sure that enough security personnel remain to control the situation. They should remain at the periphery of the scene but poised and ready for immediate action.

3) *Don't rearouse the traumatic event.* It is not advisable to ask the person why he is angry or what is the matter. Often it will only agitate him further to explain the details of the situation. Remember that at this time he is physically pumped up by the adrenalin surges associated with fight or flight syndrome. The goal at this stage is to de-escalate the scenario, not enhance the possibility of further acting out.

4) *Acknowledge any signs of anger.* It is important to acknowledge the person's anger by making behavioral observations such as, "You're sure mad as hell" or "Your're so angry your leg won't stop shaking." The intent of this type of behavioral observation is to allow the acting-out individual to become aware of how the anger is affecting him. Hopefully, this awareness will give the person the option of choosing to calm down. The shift in awareness is also important because it allows the person involved to turn his attention from the environment to himself.

5) *Describe your role as protector.* Let the person know that you will have to stop him from acting on his urges

The findings discussed in this article are not the result of the author's work with the National Institute of Corrections and are not to be associated with the Institute. The author would like to offer special thanks to Mrs. Tracy Vessels for her editorial assistance.

to hurt himself or others. The individual needs to know that it is security's role to protect all inmates within the system, even from themselves.

6) *Loudness doesn't always equate with violence.* The quantity of noise a person makes is not related to the level of his dangerousness. One exception to this rule might be the person with a diagnosed borderline personality disorder. These persons often act out with little or no external provocation. The acting out of such persons is usually due to internal thoughts or images that have little or no relationship to the reality of their surrounding.

7) *Be aware of signs of drug abuse.* Ascertain as soon as possible if any signs of drug abuse are present at the scene or if any participant has been recently using any drugs. De-escalating a violent scene where drug use is present is much more risky and dangerous for the institutional staff.

It is important to emphasize again that this procedure is designed to talk the acting-out person down without the use of force, but if this process fails to work, then it may be necessary to take swift and sure action to stop any further violence.

Basic Concerns for Security/Administration

The following points are provided as guideposts for security and administrative personnel who are responsible for maintaining an orderly institution.

1) It is essential to build a tolerance for violence within the institution's staff. Be honest about the incidents of violence within your prison or mental facility.

2) Clear policies and procedures must be developed for any special management units, specifically in the legal use of restraints and seclusion cells within your institution. It is imperative that all staff members are trained in the policies and procedures and fully understand the legal ramifications of not following them.

3) It is essential that all line staff be trained in crisis intervention strategies and methods for handling the special management inmates. It is imperative that correctional staff members be instructed that the least force necessary to handle the situation is the appropriate action. It is important that security personnel be trained to develop a professional attitude and demeanor when approaching inmates in general and especially violent acting-out agressors. It is necessary to develop a demeanor that is firm and forceful without being threatening or provocative. It is necessary that the correctional officer remain calm and collected when in the presence of inmates. A quote from Indian Medicine Man Mad Bear Anderson describes how the manner in which one approaches an offender can either enhance or minimize the acting out behavior:

> There's no need to create any opposing destructive force; that only makes more negative energy, more results and more problems.
>
> If you have a sense of opposition—that is, if you feel contempt for others—you're in a perfect position to receive their contempt. The idea is to not be a receiver. You people have such anger and fear and contempt for your so-called criminals that your crime rate goes up and up. Your society has a high crime rate because it is in a perfect position to receive crime. You should be working with these people, not in opposition to them. The idea is to have contempt for crime, not for people. It's a mistake to think of any group or person as an opponent, because when you do, that's what the group or person will become. (Boyd, 1974)

This quote describes a psychologically healthy manner in which to approach an acting-out offender. Be prepared to handle violent acting-out inmates as a necessary part of the job and do your best not to view the person as an opponent or enemy. When your staff members approach the acting out aggressor, instruct them to minimize any visual indicators of their fear or anger.

4) It is important to determine who has the responsibility for the violent offender, security or treatment. During the initial management phase, security needs to be in charge of the violent aggressor, unless the aggressor is currently undergoing psychological or psychiatric care. If the aggressor is under the care of mental health professionals, a team approach between mental health professionals and security is recommended. It is essential that treatment staff members are not used to restrain the acting-out inmate, unless no one else is available.

5) All staff, treatment, security, and support (food supervisors, clerical, etc.) must be trained in understanding the psychological dynamics of violent acting-out individuals and the specific institution procedures for their management. In addition to the training on how to understand individuals with mental health problems, basic modules on communication skills and stress management are also useful additions to any training curriculum for institutional personnel.

6) The staff must understand the security/treatment dilemma. The dilemma refers to the fact that sometimes a person who is acting out may be acting in a psychologically appropriate manner, but still be in violation of institutional rules. If forced to make a choice, the security of the institution staff and residents must take priority.

7) It is imperative that the administration insure that the most appropriate physical setting be used to hold the aggressive, acting-out inmate. The word appropriate is used here to mean that the environment is safe for the inmate and staff and does not violate the standards of the American Correctional Association.

8) It is also important that a clear policy on confidentiality be adopted and disseminated to all staff and inmates. This will help to alleviate some of the inmate's distrust of the system and provide clear direction to the security personnel about the conditions necessary for releasing confidential information.

9) Security administrators are encouraged to structure debriefing sessions for all staff involved in situations where violence or threats of violence have occurred. This process serves two purposes: first, it allows time to obtain more investigative information and, secondly, can allow the staff the opportunity to ventilate any pent up emotions.

Concerns for Clinical Staff

1) Always be prepared to ask for assistance any time you are working with an agitated person. Remember that bravado can hurt people, maybe even you.

2) What are the clinicians' rational and irrational fears of violence and inmates in general? These fears, if not addressed, can lead to poor clinical decisions because the clinicians must be careful not to project their fear

TABLE 1.—*GENERALIZED TREATMENT FOR THE MANAGEMENT AND TREATMENT OF VIOLENT OFFENDERS*

Unstructured Violence	*Behavioral Management*	*Psychological Oriented Classwork*	*Psychological Treatment of Violent Behaviors: Group Process*
History of violent behavior or current acting out within the institution.	Clear policy and procedures necessary. Explicit training for all staff (security and treatment) in how to manage this group of offenders. Strong emphasis on team approach to offender management. Management and containment of violence first, then treatment.	Provide basic information in self-help library. Offer series of psychological oriented classes with material on violence and related behaviors included. Recommended reading: Creative Aggression—Bach, Power and Innocence—Rollo May Topic examples for psychology classes include: • Anger management • Communication skills • Alcohol and drug abuse • Problem solving Class Project: Have inmates begin to document the antecedents (behavior and emotional) to their past violent acting-out scenarios.	*Key Treatment Issues* 1. It is important to increase the individual's ability to verbalize feelings and thoughts without acting out behaviors. 2. It is also necessary to teach the individual methods and strategies to increase his ability to predict the long-term consequences of his actions. 3. It is imperative to develop techniques that can aid the individual in decreasing the tendency toward egocentrism and simultaneously in increasing empathy. *Treatment Considerations* Structured physical and verbal violence allowed in the form of treatment contracts for specified time periods. Examples are: 1. Beating pillows 2. Yelling at other group members 3. Cursing. Time needs to be spent on how to survive in the institution without fights, arguments, and the resulting disciplinary actions. It is imperative that the inmate be able to discriminate between group appropriate and institutional sanctioned behaviors early in the treatment process. Utilizing the material generated by the violence log and group discussions, the inmate and psychologists will be able to develop healthy coping strategies as an alternative to violent acting out. Examples of alternative coping strategies: 1. Exercise 2. Biofeedback 3. Guilded imagery 4. Relaxation 5. Prerelease patterning for success (i.e., career development group, job club) 6. Personal problem solving 7. Moral development and empathy training.

and rage to a specific client. This process of projection can cause the clinician to over estimate a client's potential for violence. This could then result in the excessive use of retraints, both physical and chemical, or the denial of inmate access to treatment, job, or educational programs. To reveal clinicians' underlying fears, it may prove useful for the clinical supervisor to hold staff meetings on violence-related issues such as: 1) riot control and staff escape plans; 2) potential client assaults on staff; and 3) specific feelings about being taken hostage.

3) Be diligent in the supervision of new therapists because they often show the inmate too much sympathy. This usually causes too much self disclosure and brings about excessive anger towards the staff member. This in turn reinforces the client's basic distrust of people.

4) Develop a personal support network within the institution to discuss various situations as they arise. The team approach is the only method that works effectively with the client population.

Clinical Issues

Assuming that the management phase is successful and the inmate is at least minimally interested in psychological treatment, it is imperative that the clinician gain as much knowledge about violence-related behaviors and treatment procedures as possible. The following authors have developed material which will aid in the clinician's understanding in the prediction, diagnosis, and treatment of violent aggressors: Lester, 1979; Monohan, 1981; Quay, 1984; Grinspoon, 1985; Toch, 1979.

A generalized treatment plan is provided in table 1. This overview is included to aid security, administration, and clinicians to have common frame of reference for the purpose of designing and implementing a personalized treatment program within their institution.

Summary

This overview for the integration of security, administration, and clinical personnel has attempted to show the importance of maintaining a safe institution for staff and inmates. Correctional personnel often state the different values associated with security and treatment personnel within institutions as a hindrance to the effective operation of the institution. This article has offered the view that treatment cannot occur in an institution that is not secure. It's time for psychologists, psychiatrists, and security personnel to understand that by working together, everyone's job is made much easier, safer, and rewarding.

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Beyond Deterrence: A Study of Defenses on Death Row

BY CHARLES E. SMITH, M.D., AND RICHARD REID FELIX, M.D.*

Death row (Pop. 1,137) may soon lose a lot more residents to the executioner.
—*TIME*, JANUARY 24, 1983

Introduction

IN RECENT years there has been a shift in the focus of the perennial debate over the death penalty. Issues such as juridicial precision, retribution, reformation, and deterrence have given way to a concern for the best means of achieving law and order. The ideology of rehabilitation has been abandoned; there is heightened concern over the rising incidence of violent crime and renewed faith in the efficacy of punishment as a crime control measure.[1] Meanwhile, death row populations continue to rise, and public opinion polls show that an overwhelming majority favor retention of the death penalty.[2] Notwithstanding these beliefs, some prison wardens who have presided over executions have opined that the death penalty has no deterrent value.[3]

Death rows have been described as: "grim, fearsome, harsh, stark, austere, imposing and grisly." Death rows are said to foster social isolation and rejection, and the death row experience has been characterized as a "living death."[4] Nevertheless, past studies of death row inmates have found them to be fairly well adjusted to their predicament and psychologically well defended.[5-8]

Our study of North Carolina death row inmates was prompted by several considerations. In our experience, routine psychiatric evaluations of newly arrived death row inmates usually revealed no significant psychopathology. By the same token, death row inmates were referred infrequently for psychiatric attention. These observations led us to hypothesize that our death row inmates were probably psychologically well defended, in much the same manner as inmates in previously studied groups. We speculated that there might be a relationship between these inmates' defense systems and their apparent failure to be deterred. In short, our aim was to examine the individual characteristics of persons who had not been deterred in the context of their defense systems and general deterrence theory.[9-10]

Method and Materials

We contacted 43 death row inmates, 34 of whom consented to participate in this study after its purpose and conditions were explained. A printed "statement of purpose" was employed in obtaining the participants' consent. The statement was either read to the participant or shown to him, in accordance with his preference.

Each participant was interviewed following a printed structured interview protocol. Participants were allowed to decline questions as they saw fit. Responses were entered on the protocol sheets as they were obtained. All the interviews were conducted away from death row, privately, in offices located in the prison health care facilities. The interview protocol was designed to elicit basic demographic data including health history, criminal record, and information about the trial of the instant offense. No reference was made to institutional records, so all data reported here were obtained from the inmates. In each instance, a brief mental status evaluation was made and the results recorded. In taking the history, we explored occupational preferences and achievements, family relationships, and any other significant relationships. We also attempted to explore significant memories and dreams which the individual may have experienced. The final portion of the interview dealt with the inmate's perceptions of his situation and his feelings about it, his

* Dr. Smith is a professor of psychiatry and Dr. Felix is a clinical assistant professor of psychiatry and of family medicine at the School of Medicine, University of North Carolina at Chapel Hill.

[1] R. Bayer, "Crime, Punishment, and the Decline of Liberal Optimism," *Crime and Delinquency*, 27/2: 169-190, 1981.

[2] See, for example, *The Gallup Report*, November 1982, No. 206, p. 13; *The Harris Survey*, February 1983, No. 12, pp. 1-3; *The Carolina Poll*, UNC School of Journalism, February 1984.

[3] F. Zimring and G. Hawkins, *Deterrence*. University of Chicago Press, Chicago, Illinois. 1973, pp. 30-31.

[4] R. Johnson, "Warehousing for Death," *Crime and Delinquency*, 26/4: 545-562, 1980.

[5] H. Bluestone and C. McGahee, "Reaction to Extreme Stress: Impending Death by Execution," *Am. J. Psychiatry* 119: 393-396, November 1962.

[6] J. Gallemore and J. Panton, "Inmate Responses to Lengthy Death Row Confinement," *Am. J. Psychiatry* 129/2: 167-171, 1972.

[7] P. Lewis, "Killing the Killers: A Post-Furman Profile of Florida's Condemned," *Crime and Delinquency*, 25/2: 200-218, 1979.

[8] E. van den Haag and J. Conrad, *"The Death Penalty: A Debate*. Plenum Press, New York, 1983, pp. 1-12.

[9] Zimring and Hawkins supra note 3, at 1-14.

[10] See also K. Schuessler, "The Deterrent Influences of the Death Penalty," *Annals of the American Academy of Political and Social Science*, Vol. 284, 1952, pp. 54-62; H. Bedau, "Deterrence and the Death Penalty," *Jr. Crim. Law, Criminology and Police Science*, 61/4, 539-548, 1971; W. Bailey and R. Lott, "Crime, Punishment and Personality: An Examination of the Deterrence Question," *Jr. Criminal Law and Criminology*, 67/1, 99-109, 1976.

views of his alleged offense, and his feelings about the victim.

Characteristics of Death Row Inmates. The demographic data which is summarized in table 1 shows these death row inmates to be predominately young males with 9 to 12 years of schooling and blue collar level employment. Blacks are grossly over-represented, constituting over 70 percent of the group. The ages in this group ranged from 18 to 46, with both a median and average age of 26. Roughly half of these men were single, while 20 percent were either divorced or separated. Approximately 70 percent of these men claimed to be churchgoers, most embracing a Protestant faith. With few exceptions, these men claimed good physical health. Anxiety-type complaints were elicited from 20 percent of these men.

Nearly a third of these cases (10) arose in three of the south central counties of North Carolina where homicide rates are observed to be notably higher than the state average. In fact, seven of these cases arose in Robeson County, which is reported to have the highest homicide rate in the state.[11]

TABLE 1. DEMOGRAPHIC CHARACTERISTICS OF DEATH ROW INMATES

N = 34

Race	*N*	*Employment*	*N*
Black	25	Unemployed	1
White	8	Military	5
Indian	1	Skilled trade	22
		Farmer	1
Age		*Church Affiliation*	
16-25	15	Baptist	14
26-35	17	Methodist	6
36-45	1	Catholic	3
46-55	1	Muslim	1
		Other Protestant	3
		None claimed	7
Education		*Health Status*	
Less than 9 years	2	Good	27
9-11 years	18	Physical problems	3
12 years	10	Mental problems	4
More than 12 years	4		
Marital Status		*Alcohol and/or Drugs*	
Single	18	Positive history	15
Married	9		
Separated	2		
Divorced	5		

[11] K. Surles and C. Rothwell, "High Mortality in North Carolina," *N.C. Med. Jr.* 37/3, 135-140, 1976.

Nearly half of these men (15) gave histories of abusive use of alcohol and/or drugs. However, none of these men blamed their predicament on the use of alcohol or drugs.

Offense History and Trial Data. Data on past criminal record, offenses charged, and status of counsel are presented in table 2. These data show that most of these men were convicted of murder or felony murder, with the remaining 10 percent or so convicted of rape. A majority of these man (25) were defended by appointed counsel. The cases were equally divided between those with prior criminal records and those without. Approximately half of those with prior criminal records, or 20 percent of the whole group, gave histories which suggested that their previous criminal behavior might have been of a violent nature. In looking at the inmate's relationship to his victim, we found that approximately 70 percent of these men describe their victims as unknown to themselves. Of the remainder, four classed their victims as acquaintances, three described their victims as friends, and one described his victim as his employer.

Mental Status. On clinical evaluation we found all of our subjects to have at least average intelligence. Seven of our subjects evidenced depressed mood, as manifested by helpless and hopeless feelings, low energy levels, anxiety, and, in a few instances, tearfulness. A few of these cases were referred for mental health service followup.

TABLE 2. OFFENSE, CRIMINAL RECORD, STATUS OF COUNSEL, AND RELATIONSHIP TO VICTIM

N = 34

Offense Charged	*N*
Murder 1	22
Felony Murder	8
Rape	4
Prior Criminal Record	
Yes	17
No	17
Status of Counsel	
Appointed	25
Engaged	9
Relationship to Victim	
Unknown	26
Friend	3
Acquaintance	4
Employer	1

In all instances, these depressive conditions were felt to be reactive in character.

Interpersonal Relationships. In table 3 we have tabulated these subjects' perceptions of their relationships with their families and friends. Half of these subjects described their families as close-knit and supportive; the other half described families which were not supportive, these being largely families which were broken by parental divorce or separation. A representative description of a good family situation was that given by a man who stated of his family: "It was the most beautiful family a man could have; we all tried to pull together." Nineteen of these subjects described preferences for their mothers, and only five described preferences for their fathers. The remaining subjects described no definite parental preference. Twenty-four of these subjects described strong relationships with one or more of their siblings, and a couple described enduring relationships with other family members, such as grandparents. Twenty described meaningful and enduring friendships, while the remainder saw themselves as without friends. From these data it appears that this group is not entirely representative of the conventional paradigm of the violent felon, a friendless product of a broken home.

TABLE 3. INTERPERSONAL RELATIONSHIPS

N = 34

Family Structure	*N*
Close-knit	17
Broken	17
Parental Preference	
For mother	19
For father	5
Equal	5
Undefined	5
Other Important Figures	
Siblings	24
Grandparents	2
Friends	20

Childhood Experiences and Current Dreams. In table 4 we have tabulated the results of our inquiries into early memories and dream content. Twenty-three of our subjects described pleasant memories of childhood; six described unhappy memories, while responses from the remainder were inconclusive. Dream content was described as generally pleasant by 25 of these subjects. Two described unpleasant dreams, and the responses from the remainder were judged to be inconclusive. In the main, the manifest content of dreams which were characterized as pleasant had to do with being "on the outside" engaging in activities which were pleasurable in the past, for instance, "being home with family."

TABLE 4. MEMORIES AND DREAM CONTENT

N = 34

Childhood Memories	*N*
Happy	23
Unhappy	6
No data	5
Dream Content	
Pleasant	25
Unpleasant	2
No data	7

By reason of conviction for murder, all the men in this group fit the current stereotype of the "violent offender" for purposes of prison labeling and classification. However, our assessment of their histories, personal characteristics, and their behavior in prison did not show them to be violent or even threatening. Thus, although these men awaited execution as "violent offenders," their behavior on death row was generally congruent with that of other tractable prisoners who had been sentenced to long terms for similar offenses.

Defenses

In order to gain a better understanding of these men, we felt that it would be useful to explore their psychological defenses. We hoped that our evaluation of their defenses would enable us to draw some inferences relevant to general deterrence theory.

Our evaluation of defenses was entirely subjective, based on a series of questions which were designed to stimulate descriptions of the inmates' coping behavior and defensive styles.[12] An analysis of these responses showed the defenses of denial, suppression, and undoing to be highly prevalent among members of this group.

Protestations of Innocence. Prominent among the indices of denial were almost universal protestations of innocence. These were usually coupled with refusals to discuss any aspects of the offenses for which they had been convicted. In several instances, inmates responded to questions concerning their offense by stating the charge but declining to discuss it. All left the distinct impression that they wished to distance themselves from the crime as though they had not been there or, if they were

[12] Our models for defense mechanisms were drawn from G. Vaillant, "Natural History of Male Psychological Health," *Arch. Gen. Psych.* 33: 535-545, 1976.

there, that their participation was without the intent and outcome which their conviction implied.

Some representative responses in this category were the following: "They say he was shot. I'd rather not discuss that."

"It wasn't like thinking you did something and had to suffer the consequences. That sense of guilt wasn't there; maybe that sustained my confidence."

"It's like a bad dream; hard to believe. I tried to keep my mind off it."

"They just had me charged with murder. I don't want to talk about it."

In this manner, these men seemed to be asserting their belief that they simply had not done what their accusers alleged.

Projection and Rationalization. In exploring the basis for the claims of innocence which each of these men made, we found a variety of explanations. These are illustrated in table V. At least half of these inmates claimed either that they had been "framed" or that some error had been made in their charges or in the judgment of their intent. Some suggested that they were found guilty by association and a few blamed their victims. In this group, all of the claims of having been "framed" were related to racial considerations. A representative statement in this vein was the following: "There is no justice here in North Carolina for a black man." Another stated, "I am poor. If I had had a proper lawyer, I would have got justice in the case." Another complained of "life-long injustice and stated that he had been "set up." Another man complained that "the whole United States framed me because of my color. There ain't no justice."

A rather naive rationalization was presented by a man who stated of his victim, "He knew a robbery was in progress; he had no business coming in. What's a gun for if you aren't going to shoot somebody." This man added, "I don't think about it; I try not to, to avoid feeling bad." Finally, several of these men rationalized their killing by relating it to their military training and experiences. For example, one of these stated, "I'm not saying I'm not guilty of killing the man. I was taught to kill in the marine corps. When you do what they taught you to do, it is funny," and then he smiled.

TABLE 5. SOME EXPLANATIONS OF INNOCENCE

N = 34

	N
"Framed"	9
Mistake	8
Lesser offense	3
Lesser intent	11
Self-defense	3
Guilty by association	6
Victim's fault	2
Declined to discuss	4

Identification. We asked these men whether they saw any advantage to being grouped together with their peers on death row. Some representative responses to this question were the following:

"No, we have to compete to be most bad. They are scared; they have bad attitudes; they have to act tough and have to appear bad so they will be left alone."

"I think it would be better if we were in the general population. We aren't all that dangerous; it is stigmatizing."

"No, because I think most of them are mentally disturbed."

Others expressed indifference or ambivalence about being with their peers. For instance, one stated: "Yes and no; to listen to others' troubles is hard, but you get some support from sharing." These observations suggest that these men found little in their associations with other death row residents to identify with or to strengthen their own identities. On the contrary, there appeared to be a great deal that they wished to dissociate themselves from, probably most notably the stereotypical image of themselves as "killers and rapists."

Guilt, Regret and Remorse. As has been stated, anxiety and depression were not prominent among the members of this group. As might be expected, we found very little evidence of guilt. One of the two men who described guilt feelings was a 46-year-old black male who appeared both anxious and depressed. He observed that he was feeling enough guilt that he did not need additional punishment. Consistent with the relative absence of guilt among members of this group, we found very little that we could identify as remorse. On the other hand, roughly half of these men indicated that they felt sorry for the victims and their families, a feeling which was interpreted as regret, but not remorse.

Compensation. Reference to religious beliefs was not uncommon among this group, as evidenced by affirmations of belief in God and hope for redemption. This finding was thought to be consistent with these inmates' claims of church attendance and loyalty to fundamentalist religious persuasions. We do not believe that this religiosity was affected; instead, we found it to be consistent with the background and culture which these men described.

Other Defenses. Unconscious defenses such as sublimation, repression, displacement, idealization, and symbolization were not observed. It occurs to us that their apparently limited capacity for empathic emotional experience may have adversely influenced their response to deterrent values.

In our experience, offenders are often reticent to talk

about their offenses, sometimes for good reason—for instance, when their convictions are under appeal. In this respect, involvement in the trial and appeals process would appear to facilitate the development and hardening of internal defense mechanisms. Certainly, inmate counsel's admonition that he not discuss his offense while an appeal is in process can encourage suppression and denial, thereby hampering insight-oriented explorations of the offense behavior.

Discussion

In comtemplating the results of our study of death row inmates, we recognize that our findings are essentially subjective, our design having been retrospective, without controls, and without any real rating scales. However, we do not believe that these limitations necessarily discount the validity of the defenses of denial and suppression which appeared so prevalent in our group.

In considering possible relationships between these inmates' defense systems and their failure to be deterred, we were struck by the frequency with which they denied guilt and professed innocence. Perhaps this propensity for denial led these men to think of themselves as very unlikely to commit murder in the first place. If this were the case, how could the threat of execution have deterred these crimes?

Considering these men's backgrounds and aspirations, may they not abhor their acts as much as we do? What better way is there to defend against the personal loss attendant tc the violation of the taboo against murder or rape than denial or suppression?

The Supreme Court decision[13] which set aside North Carolina's earlier death penalty statute admonished as follows:

> A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. In Furman, members of the court acknowledged what cannot fairly be denied—that death is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender of the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

The salutary goals, which the Supreme Court has enunciated in this ruling for more compassionate individualized understanding of human behavior as it relates to capital offenses, are to be applauded. However, one wonders if such understandings can ever be attained in the hopeless isolation of death row.

[13] 428 U.S. 280 (1975), pp. 303-304.

The Violent Older Offender: A Research Note*

BY KAREN M. JENNISON, PH.D.

Associate Professor, University of Northen Colorado, Greeley, Colorado

THE VIOLENT offense is one which arouses great public concern. At the same time, the prevailing view is that crime declines with age and that violent youth pose the greatest threat to the public; in sheer numbers, youthful violent offenders account for far more arrests than do older persons. This is a consistent finding in studies explaining crime (Wolfgang, 1958; Pittman and Gordon, 1958; Boland and Wilson, 1978; Petersilia, Greenwald, and Lavin, 1978; Peterson and Braiker, 1981; Collins, 1981; Hirsch and Gottfred, 1983; Gove, 1985).

However, offenders who are older, though a minority of all offenders, may be as likely to engage in relatively serious violent offenses as their youthful counterparts. In fact, research on criminal behavior among the elderly reveals that they do commit violent crimes and are especially likely to be incarcerated when they do (Adams and Vedder, 1961; Ham, 1976; Wiegand and Burger, 1979; Krajick, 1979; Walter, 1980; Peterson and Braiker, 1980; Teller and Howell, 1981; Collins, 1981; Long, 1982; Shichor, 1984; Vito and Wilson, 1985).

There is certainly ample reason to believe violent crimes are a real, if numerically small, characteristic of older offenders. As the population of this country continues to age, the youthful criminals will become less numerous. And, if older offenders are likely to engage in violent acts, then although total crime rates will be down (youth are much more likely to be arrested for all types of crime), perhaps the proportion of those acts classified as violent will not decline as much. The older violent offender may come to our attention even more in the future. These patterns of criminal violence among older offenders and various correlates explaining this behavior are the focus of the article.[1]

Alcohol and Elderly Violence

The elderly offender is increasingly becoming a subject of study. Two dominant trends emerge in a review of the literature. First, as stated above, crimes of violence are increasing in the older group at a rate about twice that of the general population (Adams and Vedder, 1961; Krajick, 1979; Teller and Howell, 1981; Ham, 1976; Walter, 1980; Shichor, 1984). Second, alcohol use is significantly associated with violence committed by the elderly; that is, older offenders who commit violent crimes are likely to be intoxicated or, to some degree, under the influence of alcohol at the time of the crime (California Department of Health, 1960; Costales, 1970; Ham, 1976; Panton, 1977; Krajick, 1979; Wiegand and Burger, 1979; Peterson and Braiker, 1980; Walter, 1980; Langan and Greenfeld, 1983).

The evidence linking the excessive use of alcohol to elderly criminal behavior shows alcohol playing a highly damaging and socially disruptive role. Violent crimes among older problem drinkers increase with age; as drinking increases, more violent crimes are reported. Ham (1976), for example, found that over 63 percent of his sample of Michigan state prison inmates over 50 years of age were in prison for some form of homicide, and all the murders committed by his subjects involved heavy drinking. A high incidence of alcoholism and unstable social relationships are descriptive of elderly inmate populations in general (Krajick, 1979; Peterson and Braiker, 1980; Walter, 1980). These studies help to document a pattern in elderly crime: most elderly offenders seem to have drinking problems, and heavy or excessive alcohol use contributes, in some fashion, to their violent crimes.

Previous studies thus indicate that violent crimes among the elderly are, for the most part, associated with a history of excessive drinking and with the use of alcohol immediately prior to the crime for which they were arrested. An older age, first violent crime relationship is hypothesized in the study; violent offenses against persons will be associated with a first incarceration at an older age. ("Older," for purposes of the study, is defined as age 50 and above.) A second major hypothesis is that alcohol will be shown to be related to violent offenses.

The relationship between drinking before the crime, intoxication levels, and concomitant social drinking-situational factors will also be examined: the amount and inebriation effects of alcohol consumption, the amount of time spent drinking before the crime, where, and with

*The data utilized in the study were made available by the Inter-University Consortium for Political and Social Research. The data for the Survey of Jail Inmates, 1978, were originally collected by the Bureau of the Census for the Law Enforcement Assistance Administration. Neither the collectors of the original data nor the Consortium bear any responsibility for the analyses or interpretations presented here.

[1] Violent crimes are defined according to the F.B.I. Uniform Crime Reports Index Crimes. We are largely interested in the four crimes classified as violent: homicide, forcible rape, robbery, and aggravated assault.

whom. Situational factors, or drinking context, may be of considerable importance as conditional variables through which the use of alcohol increases (or decreases) the probability of violent responses and criminal behavior in older social groups (Blum, 1981; Roman, 1981). The relative impact of particular patterns of drinking on patterns of criminal behavior are explored in interaction with other descriptive variables.

Data and Methodology

Data utilized in the study are drawn from the Bureau of Census nationwide sample of jail offenders conducted for the Law Enforcement Assistance Administration in 1978.[2] More than 158,000 persons were estimated to be held in locally operated jails at that time. The survey consists of a stratified random sample of 5,247 completed interviews of inmates selected from a universe of approximately 3,700 institutions. Two hundred ninety-two of these inmates were over 50 years of age. The use of a national prisoner statistical database meets the critical need for broader perspectives on elderly offenders and the offenses they commit.

The over 80 variables in the research design are categorized into four broad areas: 1) sociodemographic data; 2) offender history and previous contact with the criminal justice system (the number of past offenses, other than drunkenness or traffic, and probation experiences as a juvenile or adult were also assessed); 3) employment history; and 4) variables related to drinking behavior and alcohol consumption in the year before incarceration and immediately preceding the offense for which the offender was convicted. Research methodology includes the use of nonparametric and regression statistical analyses.

Drinking Measures:

The objectives of this article are to identify the criminal career and drinking patterns of older individuals who commit violent crime and to determine if alcohol use, or problem drinking, is closely associated with criminal behavior. Cahalan and Cislin's (1976) definition of problem drinking is used as a point of departure: "problem drinking is a repetitive use of beverage alcohol causing physical, psychological, or social harm to the drinker or to others." Thus, in discussing alcohol problems, we are primarily interested in alcohol use, as in the above statement, which creates undesirable consequences (crime and punishment) for the individual rather than as an attempt to determine alcoholism, which is more a medical than sociological problem.

Basic data on measures of drinking are derived from the following question asked of offenders: "What alcohol beverages do you drink?" (beer, wine, liquor, other alcohol, didn't-don't drink). "During the year before you were arrested, how often did you usually drink?" (every day, nearly every day, three or four days a week, three or four days a month, about once a month, never). And, "about how much did you drink at one time on the average?" Offender responses provide minimum estimates of general drinking patterns, per drinking occasion, the year before arrest for present sentence.

Other studies have shown, as Cahalan (1970) points out, that there is apparently somewhat less minimization of drinking in the respondent's own reports. If anything, drinking is usually underestimated in self reports (Haberman, 1963). Moveover, Adams and associates (1981:448) have argued that in studying group comparisons of self-reported alcohol consumption, it is better to document an individual's drinking patterns by the amount of alcohol consumed rather than by using broad categories, such as heavy or moderate drinking.

Drinking and Crime:

Empirical measures of the relationship between problem drinking and crime are based on the question: "Had you been drinking just before the offense(s) for which you were convicted?" "At that time were you drinking beer, wine, liquor, or other alcohol beverages?" And "about how much would you say you drank at that time?" These questions provide a composite measure of the interaction effects of drinking behavior and alcohol consumption in relation to crime. They reveal whether the offender had been drinking before the crime for which he was convicted and, if so, the variation in the number, size, and alcoholic content of the drinks.

Intoxication Measures:

It is important that a measure of the amount of alcohol consumed be kept separate conceptually from the measure of the physiological effects of drinking, which involves individual responses to variance in the frequency and quantity of alcohol intake. High levels of alcohol intake are not necessarily related to high levels of intoxication; individuals respond to the same amount of alcohol in widely difffering ways. For some it is a catalyst for violence, for many others it is not (Glaser and O'Leary, 1966; Mulvihill, 1969; Tinklenberg, 1973; John, 1977-78). Because the immediate effects of alcohol consumption cannot be strictly measured by the quantities of alcohol involved, it would appear, as Rubington (1973) observed, that the significance of any measure of the association of alcohol intake with criminal behavior rests ultimately on the effects of alcohol on the individual.

[2] See Jones (1979) for a description of the sample design, estimation procedures, and reliability of the estimates.

The "alcohol effects" measure is constructed from offender responses to the following questions asked in reference to their regular, preincarceration drinking patterns and also to their drinking behavior before the crime: "At the time you would (regularly) finish drinking, would you say you were very drunk, pretty loaded, feeling good, or relatively sober?" "Had you been drinking just before the offense for which you were convicted?" And, "would you say you were drunk, pretty loaded, feeling good, or relatively sober at that time?" Responses were converted into two separate "alcohol effects" indexes, one utilized in analyzing drinking effects of the offender's regular drinking practices and another used with his crime-related drinking behavior.

Both indexes are measures of the "personal effects" function of drinking: 0) no alcohol intake (offender did not drink before offense or is an abstainer); 1) low alcohol effects (relatively sober); 2) moderate effects (some degree of intoxication); and 3) high effects from alcohol ingestion (drunkenness). Theoretically, the indexes are equally weighted interval level measures of alcohol variables, the basic assumption being that an individual's position on the indexes is equivalent to levels of alcohol intake and behavioral implications which put the drinker at risk of criminal entanglement.

Correlates of Violence:

One major idea explored in the article is the role of the drinking context in promoting violence. Very little research has examined the relationship between alcohol use, situational factors, and violence (Collins, 1981). Examples of each situational variable used in the study and the response range for each question asked of offenders is as follows: "About how many hours were you drinking (before the crime)?" "Where were you drinking—1) at home, 2) at a friend's or relative's home, 3) in a bar or tavern or restaurant or store, 4) in a car, 5) out of doors (field, park, ballgame, etc.), 6) on the street, 7) at work, 8) other?" "Were you drinking alone or with others?" "Who were you drinking with—1) family, 2) friends, 3) anyone around, strangers?" These response items are broadly descriptive of the social drinking context. They define potential alcohol-crime factors present in the drinking situation.

Findings

Significant statistical associations between the level of violence and other factors are identified in table 1 using bivariate correlations (Pearson r). These measures describe the effect of a single variable on the dependent variable (elderly violence) without the interaction effect of other, perhaps confounding, independent variables in the equation.

TABLE 1. SIGNIFICANT BIVARIATE CORRELATIONS (PEARSON) BETWEEN ELDERLY VIOLENCE AND 64 INDEPENDENT VARIABLES (N = 292)

Variables	*r*	*p*[a]
Ethnicity	.213	.001
Marital Status	.139	.01
Previous Alcohol-related Offenses	.499	.01
Past Probation	.305	.01
On Probation at Time of Arrest	.145	.01
Income	−.214	.001
Main Source of Income	.140	.05
Number of Dependents	−.147	.02
Number of Dependents on Welfare	.226	.01
Use of Alcohol before Offense	.461	.01
Type Alcohol Beverage before Offense (Wine, Liquor)	.244	.03
Intoxication before Offense	−.194	.001
Drinking on Street	.151	.05
Drinking with Friends	.128	.02
Employment (Not Working) at Time of Offense	.205	.05

[a]All measures are statistically significant at the .05 or below probability level.

Those older offenders engaging in violent crimes were likely to be unmarried males (widowed, divorced, or separated). Nonwhites were more likely than whites to engage in violent crimes. These factors have also been found to be true of younger offenders in other studies of violent crime (Wolfgang, 1958; King, 1969; Cahalan, 1970; Cahalan and Room, 1974; Harper, 1976; Silberman, 1978).

The employment history and income of older offenders formed another distinct cluster or variable subset associated with criminal violence. More violent offenders had lower incomes and fewer dependents (in line with their unmarried status) than those not so violent. However, their incomes came not from Social Security or welfare, but from other wage-earning sources. Over all, the most violent elderly offenders were more likely than others to be unemployed at the time of the offense.

Previous contact with the criminal justice system, drinking history, and drinking behavior before the offense are correlated with elderly offenders committing the most violent offenses. The data indicate that offenses of the elderly are "recidivist drinking-related violent crimes." Fully 59 percent of the offenders in the study had previously been convicted of a violent crime which was alcohol connected. In addition, being on probation at the time of the arrest is correlated with seriousness or violence of the offense.

Violent crime is associated with older drinkers who have generally high alcohol consumption patterns, with the use of alcohol (wine or liquor) before the offense

(r = .461) and with drinking primarily in a street context with friends or acquaintances.[3] These findings may be inconsistent with prior research showing that the peak prevalence for almost all types of drinking problems is in the twenties, rather than in older age groups (e.g., Cahalan, 1970). A study comparing older and younger offenders on the alcohol-crime connection could resolve this question.

Multiple Regression

In using the multiple regression design, we examine the interaction effects of independent variables with criminal violence of the elderly in terms of the amount of variance that can be explained when the effects of other variables are controlled. The question, basically, is how much of the variance in violent behavior among the elderly can be accounted for without appealing to other predispositional factors such as biological (medical) and psychological (personality) variables.

Examining table 2, we see that after independent variable interaction effects are controlled, previous violence correlates hold constant and in the predicted direction. There remain three basic types of variable subsets which reduce error in analyzing violence in offenders over 50. These variables—demographic, economic, and alcohol problems—explain approximately one-fifth of the variance in violence of the crime ($R^2 = .215$; $p < .001$). Of interest here is that even though the individual is old, the street drinking context can induce violence, especially when there is a previous history of it. We usually assume the older offender is relatively harmless, being a typical, petty alcoholic criminal (e.g., Pittman and Gordon, 1958). We have seen that some older offenders coming out of that context may be harmful to others.

However, although the drinking context may be an important predictor of problematic alcohol intake (e.g., police problems), there may be other instances, as Tinklenberg (1973:208) mentioned, where drinking context and alcohol use may coexist with interactions that culminate in violence (for older individuals) but exert little or no influence on the eventual outcome.[4]

TABLE 2. MULTIPLE REGRESSION BETWEEN VIOLENCE AMONG OLDER OFFENDERS AND SIGNIFICANT INDEPENDENT VARIABLES (N = 292)

Variables	r^2	*F*	*Sig. F*[b]
Demographic (Sex, Ethnicity, Marital Status)	.05	6.344	.001
Employment History and Income in Year before Crime for Which Convicted(Unemployment and Low Income)[a]	.01	4.633	.001
Previous Alcohol-related Criminal Justice Contact	.04	3.394	.005
Probation Problems	.02	2.874	.03
Drinking Context (Street)[a]			
Alcohol Effects before Crime (Intoxication)			
Type Alcohol Beverage Consumed before Crime (Wine, Liquor)			
Hours Drinking before Offense (Mean: 5-10 Hours)			
Drinking with Friends before Crime	.08	2.72	.002
Multiple R = .463			
R^2 = .215			
F = 3.524			
Sig. F = P.001			

[a]Variable sets were combined with demographic variables in the final regression.

[b]All measures are statistically significant at the .05 (or below) probability level.

Discussion

Pernanen (1981:52) states: "Considering that alcohol seems to have a strong association with serious crime—it is surprising that alcohol has only a peripheral role, if any, in theories of crime." National data support this perspective.[5] Alcohol consumption and intoxication explain significant degrees of variance in elderly violence. The old as well as the young, as Zimberg (1979) says, use and misuse alcohol in significant numbers. The type of violent crime most frequently found in the literature to be associated with alcohol is violent homicide (Pavloff, 1974; Fisher, 1951; Cleveland, 1955; Hollis, 1974; Mayfield, 1976). The second most common type of alcohol-related violent crime, as in this study,[6] is aggravated assault (Roebuck and Johnson, 1962; Pittman and Handy, 1964; Blum, 1969; Gerson, 1978).

The older offender, usually a former offender, has a high rate of part-time employment and unemployment. In addition, unemployment is a major contributing fac-

[3] This finding is identical to Goldstein's (1976) "familiarity-aggression effect" in social situations: "Aggression is most apt to be used in such a situation when the person provoked is in a familiar enviornment (familiar to the offender, against a victim familiar to the offender) or has a weapon readily at hand."

[4] Tinklenberg (1979:208) defined a theoretical range of situations in which the use of alcohol might be implicated with violent behavior:

1) In some situations, alcohol will provide a crucial determining influence which escalates an argument into an attack.

2) In other instances, the use of alcohol may temperally and physically coexist with interactions which culminte in violence but exert little or no influence on the eventual outcome.

3) There will be situations in which the use of alcohol reduces the probabilities of violence, perhaps by increasing convivality or by simply rendering less effective the physical maneuvers required for assault.

[5] Rozen (1981) and Collins (1981) observed that one weakness in previous studies of alcohol and crime is that most were done on arrested and prison populations. The arrest data in jail-based studies, however, indicate a much stronger relationship between crime seriousness and alcohol involvement than do prison studies.

[6] The percentage of violent types of offenses committed by elderly offenders in the sample is as follows: Seventeen percent are homicides and 20 percent attempted homicides; robbery, 11 percent; sexual assault, 6 percent; aggravated and simple assualt, 42 percent.

tor to further violations of the law (Pownall, 1975). The connection between economic factors, alcohol abuse, and violent crime is frequently reported in previous research on violent crime (Gelles, 1971; *Justice Assistance News*, 1982). Gewirtz (1984:198), for example, describes the economic-alcohol-crime contingency in terms of the aging process: "The younger person who drinks moderately can avoid trouble with the law," she says, "but an older jobless individual who has lost his family, and may now also have a more difficult time metabolizing even a small amount of alcohol or wine, can more easily come into conflict with the law and society."

Existing studies show a relationship between alcohol and different types of violent behavior, including suicide and automobile accidents (Mulvihill and Tumin, 1969). Alcohol may also be related to recidivism for violent offenses: once an inmate has committed an offense under the influence of alcohol, he is likely to repeat his offenses if he continues to drink (Haines, 1978). Insofar as the older offenders are heavy users of alcohol, their proneness to violence may increase.

The single factor most predictive of violence is simply past offenses. Persons with a record of violent crime commit a disproportionate number of violent offenses (Monahan, 1981). The violent older offender should, on the whole, be predictable, having had a previous criminal career. However, Monahan (1981) also found that individuals do not specialize in crimes; hence, the petty thief may be a robber next time or may be convicted of murder on another occasion. So, predictability on the basis of past offenses is far from perfect.

Conclusion

In summary, the use of national baseline data has produced considerable evidence that the violent behavioral effect of alcohol on elderly offenders is partly shaped by demographic, social, and situational factors—all interrelated with drinking—both before the criminal event and, to some extent, over the individual's lifespan. These findings provide a theoretical framework for the testing and application of alcohol-crime relationships among elderly offenders, only the first steps in the complex task of formulating alcohol etiology for specific types of criminal behavior among the elderly. Future research on the elderly offender should focus on the frequency, intensity, and character of violence where alcohol is and is not abused.

The study suggests a "high need for alcohol rehabilitation among elderly offenders" (Langan and Greenfeld, 1984). It also indicates the need for maintenance of widespread alcohol screening of older offenders at the judicial level, providing more information in the criminal justice system and correctional institutions about elderly offenders who are problem drinkers. The identification of the elderly problem drinker, who has experienced criminal involvement, represents the first challenge in efforts toward treatment. Once the older offender retires from a correctional environment to the community, there is also a vital need to coordinate alcoholic treatment programs with existing geriatric social services (see Snyder and Way, 1983).

Through this approach the correctional process could, at the very least, aid in the development of more humane and effective classification methods permitting more discriminating selections and techniques for treatment of older offenders with drinking problems. For, contrary to public images, misuse of alcohol among the elderly does not always lead only to public drunkenness and petty offenses. It is very often connected with a serious violent act of some sort.

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Probation in Illinois: Some New Directions

By Gad J. Bensinger and Magnus Seng*

Introduction

PROBATION IN Illinois is a mixture of county, probation district, and circuitwide systems, in which adult and juvenile services are organized under joint or separate departments. Of the 102 Illinois counties, 94 have probation departments that have at least one full-time probation officer. The county of Cook employs approximately 700 probation officers, more than half of the state total. (In Cook County, which includes the city of Chicago, there are three separate and distinct probation departments under the jurisdiction of the Chief Judge. There are separate agencies for juveniles and adults, and one agency for felons and another for misdemeanants.)

Not too many years ago probation departments in Illinois were largely staffed by poorly educated, untrained, more often than not politically appointed patronage workers whose ability to deliver quality probation services was questionable at best. Presentence investigations, if done at all, were inadequate, and supervision of offenders was virtually nonexistent. Similarly, records were incomplete or, worse, did not even exist. In some jurisdictions it was difficult to discover who was actually on probation. Many jurisdictions had only part-time officers, and some had no probation services at all, while in other jurisdictions caseloads were as high as 400. Although probation was the most frequently used sentencing alternative, it was also the most neglected.[1]

Today, important and potentially far-reaching changes are being implemented in the Illinois probation system, making the 1980's one of the most significant decades for Illinois probation since the turn of the century. The purpose of this article is to examine how it has been possible to effect meaningful change in a locally based probation system that for so many years languished in mediocrity and misuse.

While by no means intended to be an exhaustive list, we believe the following interrelated factors to have been the more important in achieving meaningful change in Illinois probation:

1. Prison Crowding
2. LEAA-Initiated Change
3. Legislative Developments
4. Trends in Felony Probation.

*Dr. Gad J. Bensinger is professor and chairman and Dr. Magnus Seng is associate professor in the Criminal Justice Department, Loyola University of Chicago. An earlier version of this article was presented at the Annual Meeting of the Midwestern Criminal Justice Association, October 3, 1985.

Prison Crowding

The stimulus for the present probation initiatives must be attributed, in no small measure, to the serious prison crowding problems that have plagued the state in recent years.

As can be seen from figure 1, the trend over time in the state's prison population shows numerous peaks and valleys. The total adult prison population gradually declined to a low of 5,770 in April 1974. But since then, it has steadily and dramatically increased. By 1977 it had reached 10,777, by April 1983, 13,350. As of this writing, the present adult institutional population stands at 17,394.[2]

When the population reached its 1983 high of 13,350, the state imposed a lid on the prison population and initiated a controversial policy—early release and use of meritorious good time—to reduce prison population. This policy encountered vigorous opposition, in particular from the law enforcement community, which feared the early release of dangerous felons. This group, led by the Cook County State's Attorney, successfully petitioned the Illinois Supreme Court to stop the granting of "meritorious good time," and the court, on July 12, 1983, ended the practice. The result, of course, was a continued increase in the prison population, and the situation soon came to take on crisis proportions. As a consequence, probation as an alternative to incarceration appeared more appealing than ever before, and probation reform received a very important boost.

The idea of probation as a viable alternative to incarceration, especially during periods of prison crowding, had been advanced on many previous occasions. In the past, this usually resulted in little real change in the manner in which probation services were provided, but this time need for reform prevailed.

LEAA-Initiated Changes

Following the creation of the Law Enforcement Assistance Administration (LEAA) in 1968, approximately $6 million in Federal funds were invested in Illinois probation. The various programs funded through LEAA in the 1970's contributed significantly to the improvement in the kinds and quality of probation staff through train-

[1] Richard Sullivan and Magnus Seng, *Probation in Transition, Illinois Probation: 1970-1980* (Performance Evaluation Division, Illinois Law Enforcement Commission, January 1980), p. 1.

[2] Illinois Department of Corrections, *Perspectives*, vol. 6, no. 4 (November 1985), p. 4.

ing programs.[3] A less noticed but potentially a more important consequence of the LEAA program in Illinois relates to the planning process that was mandated for the disbursement of the LEAA funds in the state.

Beginning in 1969, Federal LEAA funds were made available to each state to be administered by a state planning agency. The state planning agency established for this purpose in Illinois was the Illinois Law Enforcement Commission (ILEC), which was a part of the executive branch of government. This arrangement posed no problem for law enforcement or corrections. However, the courts, upholding the Separation of Powers Doctrine, challenged the legitimacy of an executive branch agency planning for the judiciary—a concern shared by courts nationwide at the time. Although probation in Illinois is locally administered, it has always been part of the judicial branch of government, and—thus—planning for probation became caught up in the controversy over which branch of government had the authority to plan for the use of LEAA funds for court-related programs. This matter was resolved only after the Illinois Supreme Court in July 1970 established the Supreme Court Committee on Criminal Justice Programs. This committee, funded through the ILEC, was given statewide responsibility for planning all court programs using LEAA funds. In short, the judicial branch did the planning for the use of funds made available by an executive branch agency.

One of the more creative policies implemented by the Supreme Court Committee on Criminal Justice Programs was the stipulation that no probation project could be eligible for Federal funds until the completion of a professional probation management study in the judicial circuit or county. Such studies were consequently performed by a full-time ILEC supported probation coordinator on the staff of the committee, and it usually resulted in a set of recommendations for probation improvement in the jurisdiction studied. The chance to qualify for Federal funds, possibly in substantial amounts, was often sufficient incentive for a local probation department to allow a state level committee to study its operation and recommend change. These studies were completed in all the judicial circuits by 1979 and yielded a wealth of data about how probation was actually being managed in the state. It is our belief that this entire process had a far greater benefit than simply dollars and data, for it established the principle of a state level agency making recommendations and even setting guidelines on how probation should operate at the local level. As is discussed in greater detail below, this principle, along with financial incentives, formed the basis for much of the probation legislation that has been introduced and enacted in recent years.

An additional important impact of LEAA funds upon probation in Illinois was their use in overcoming a certain inertia on the part of the Administrative Office of the Illinois Courts (AOIC), an arm of the Illinois Supreme Court responsible for probation. Established in the early 1970's, the AOIC was too new to assume the necessary leadership role for improving probation. Because of this, the Illinois Law Enforcement Commission in 1974 took the initiative and funded a week-long forum convened by the Illinois Probation and Court Services Association "in an attempt to identify the concerns of probation professionals in the state and develop a consensus for support of probation reform."[4] A significant outcome of this forum was a position paper, later introduced as a bill in the Illinois Legislature, that advocated the creation of a commission to professionalize probation services in Illinois.

This new development served as a clear indication to the Administrative Office of the Illinois Courts that unless it acted soon it could lose, perhaps by default, the leadership for reform. Consequently, a number of legislative initiatives, stimulated in part by the position paper but guided by the AOIC, culminated in the enactment in 1978 of "An Act in Relation to Subsidy for Probation Officers." This act, among other things, provided for the establishment of a Probation Division within the AOIC with responsibilities to develop hiring, promotional, and training standards for state subsidized adult and juvenile probation officers, a uniform record keeping system, and a method for collecting statistical information on probation services in Illinois. It is interesting to note that the division's first and still current director was the same probation coordinator who had managed the probation management study program funded by LEAA through the Supreme Court Committee mentioned above. The Probation Division, as will be further demonstrated below, has become the focal point for the initiation and implementation of rapid change in Illinois probation.

Legislative Developments

The third major factor in achieving meaningful change in Illinois probation relates to a certain compromise between state control and local autonomy reflected in legislation and tied to the state assuming an ever increasing level of funding of local probation systems.

In 1973, The National Advisory Commission on Criminal Justice Standards and Goals called attention to the fact that probation in the United States is affected by two important issues: "Whether it should be part of the judicial or executive branch of government; and

[3] Gad J. Bensinger, "Training for Criminal Justice Personnel: A Case Study," *Federal Probation*, XXXXI, no. 3 (September 1977), pp. 31-36.

[4] Douglas D. Bowie, "Chronology of Probation Reform Legislation in Illinois" (Administrative Office of the Illinois Courts, Probation Division, August 20, 1984), p. 3.

whether it should be administered by state or local government."[5] These very issues have been at the core of the probation debate in Illinois for many years. Indeed, the controversy over how probation services should be organized, and the concomitant concern about loss of local control and authority over hiring of probation officers, has played a crucial role in the legislative process that has led to the changes in funding, hiring, and training and the provision of services that characterize the system at the present time.

State vs. Local Funding

The Illinois statutes governing probation originally provided that the maximum salary of probation officers, although paid by the counties, would be determined and fixed by state law. (Thus, for example, the maximum salary of probation officers in Cook County before 1975 was $10,000.) In 1966, a state subsidy program was initiated for juvenile probation officers in Illinois, under which qualifying counties were partially reimbursed by the state for the juvenile probation services they rendered. (The state paid for one-half of the juvenile probation officer's salary, or a maximum of $300 per month for each officer.) County participation in the subsidy program was discretionary. Although the state now provided limited financial support, it exercised no administrative control over probation. After 1966, reformers continued to advocate that probation in Illinois become state controlled or state funded, but no legislative initiatives in that direction were undertaken until the middle 1970's.

In 1975, as a consequence of the position paper generated by the Illinois Probation and Court Services Association forum, legislation was introduced calling for a state-funded probation system under the direction of the Administrative Office of the Illinois Courts. Initially, this legislation gained much support, but it died because of financial uncertainties, controversy over the constitutionality of the proposed scheme, and the concern and hostility of those who feared the loss of local control. Proposals ranging from partial probation subsidies to full state funding of probation continued to be made. In 1977, three different reform measures were introduced in the legislature. One called for full state control of the probation system. Another comprehensive proposal would have preserved local control of probation but would have had the state pay half the probation officers' salary on condition that uniform state standards would be imposed. The third measure called for a $500 a month probation officer salary subsidy for both adult and juvenile officers in any county that would agree to pay a minimum salary of $11,000 and accept minimum state standards for hiring and training probation officers.[6] This particular bill, in its original form, was supported by the newly elected Governor, James R. Thompson. However, by the time it cleared the legislature, the state's influence over probation had been weakened so much through amendments that the Governor vetoed the entire measure. Consequently, the original version of the bill was reintroduced in 1978 and was signed into law by the Governor. (Before signing the bill, the Governor reduced the salary subsidy from $500 to $400 per officer per month.) This law, "An Act in Relation to Subsidy for Probation Officers," took effect on January 1, 1979.

No new legislative initiatives were successful until 1983. As pointed out before, because of the state's prison crisis, probation was becoming an attractive alternative to prison. Thus, for example, the Governor's own Task Force on Prison Crowding, in recommendations published in September 1983, stated that "Probation can be a viable and inexpensive alternative to incarceration." However, the task force added that "the first step toward improving probation services would be the adoption of a state-wide system...and that the development of effective local programming will only follow the development of a unified system of funding and oversight."[7] With that impetus, a new probation law, entitled "An Act Creating a State-Wide System of Probation," was passed by the legislature in November and signed by Governor James Thompson on December 9, 1983. The intent of this law was to improve the quality and quantity of probation throughout the state by streamlining the entire system over a period of 3 years.

The act provided that beginning on April 1, 1984, the state would start reimbursing the counties the salary of all current and future Chief Managing Officers, probation officers hired after April 1, 1984, and some 60 additional probation officers that would be hired for the new Intensive Probation Supervision Programs (see below). In addition, the Act provided that the state subsidy initiated in 1979 be raised from $400 to $500 per month, if the probation officers' yearly salary was at least $14,000. The most recent Illinois probation bill was signed into law by Governor Thompson on September 20, 1985. It provided that the state subsidize the counties at a rate of $1,000 per month for each probation officer's position which has a salary of at least $17,000 per year.

Hiring and Training

Historically, probation in Illinois was—and in many instances still is—closely identified with local patronage systems. This, of course, has hindered the professionalization of probation in the state. Also, professional training for probation officers, especially adult probation of-

[5] National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (Washington, D.C.: Government Printing Office, 1973), p. 313.

[6] Charles N. Wheeler, "Move to Upgrade Probation System," *Chicago Sun-Times*, April 25, 1977.

[7] *Governor's Task Force on Prison Crowding Recommendations* (Springfield, Illinois: State of Illinois, September 1983), p. 9.

ficers, was almost nonexistent in Illinois until the early 1970's.[8]

To appreciate the most recent reforms, it is necessary to understand that since the inception of probation in the state in 1898, the power to appoint and remove probation directors and officers has rested with the local judiciary. Each Chief Judge has been responsible for the probation department in his respective circuit. (There are 21 judicial circuits in Illinois.) Until recently, the statutory qualifications for appointment as a probation officer were that the candidate be "of good character," over 25 years of age, and willing to take a loyalty oath. Any other qualifications were left to the discretion of the individual circuit courts.

With the passage of the Subsidy Act in 1978, the first minimum state standards for hiring and training probation officers in Illinois were set up by the Probation Division of the AOIC. At the present time, the minimum qualifications for probation personnel include the following provisions:

(1) That any person employed as a probation officer in Illinois be a citizen of the United States and a resident of the county, probation district, or circuit in which he/she is employed, and be "otherwise generally qualified as provided by law or rule of court."[9]

(2) That nonsupervisory probation personnel shall have completed 4 years of college credit, or 2 years of college credit and 2 or more years of criminal justice or social work related employment.

(3) That supervisory probation personnel shall possess a bachelor's degree and have at least 2 years employment experience in specified related fields.

(4) That chief probation officers shall possess a bachelor's degree and 5 or more years experience in specified related fields "with demonstrated ability in management and supervision of probation or related services departments."[10] At least 2 years employment would suffice for chief probation officers possessing a master's degree in social services or public administration.

Pursuant to later legislation ("An Act Creating a Statewide System of Probation"), the Probation Division of the AOIC set up the following procedures for probation employment and promotion in Illinois:[11]

1. An application is submitted to the Administrative Office of the Illinois Courts together with a copy of one's college transcript.

2. Copies of this application are forwarded to the Office of the Chief Judge of the county in which the applicant is seeking employment.

3. A list of applicants, certified as qualified by the AOIC, is submitted to the appropriate Chief Judges.

4. Candidates from this approved list may be interviewed and hired by the local court or its representatives.

A similar procedure has been developed for probation officers seeking promotions to supervisory positions and to positions of Chief Managing Officers.

As can be seen, despite state funding, the power to hire and promote probation officers in Illinois continues to rest with the local judiciary rather than the state.

The Illinois Legislature has also placed responsibility in the AOIC for establishing training standards and for sponsoring and monitoring training programs throughout the state. Consequently, specific minimum training requirements for probation officers were set by the AOIC's Probation Division. For example, for nonsupervisory probation officers, a minimum of 40 hours of training during the first year of employment and 20 hours during each of the following 5 consecutive years became a requirement. Similar requirements have been set for supervisory probation personnel and Chief Managing Officers.

Trends in Felony Probation

As Joan Petersilia has pointed out in her studies on probation,[12] there has been a national trend to place serious felons on probation because of prison overcrowding and budgetary limitation. At the same time, to use Petersilia's term, probation has been "repackaging" itself to meet the new demands and expectations placed on the system. One clear implication of the Petersilia study is that placement of serious felons on probation without at the same time improving the quality of probation supervision will lead to high rate of failure. We have already indicated that in Illinois the prison crisis has indeed given impetus to important changes in probation. Illinois has also joined a growing number of states that

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[8] Bensinger, pp. 33-35.

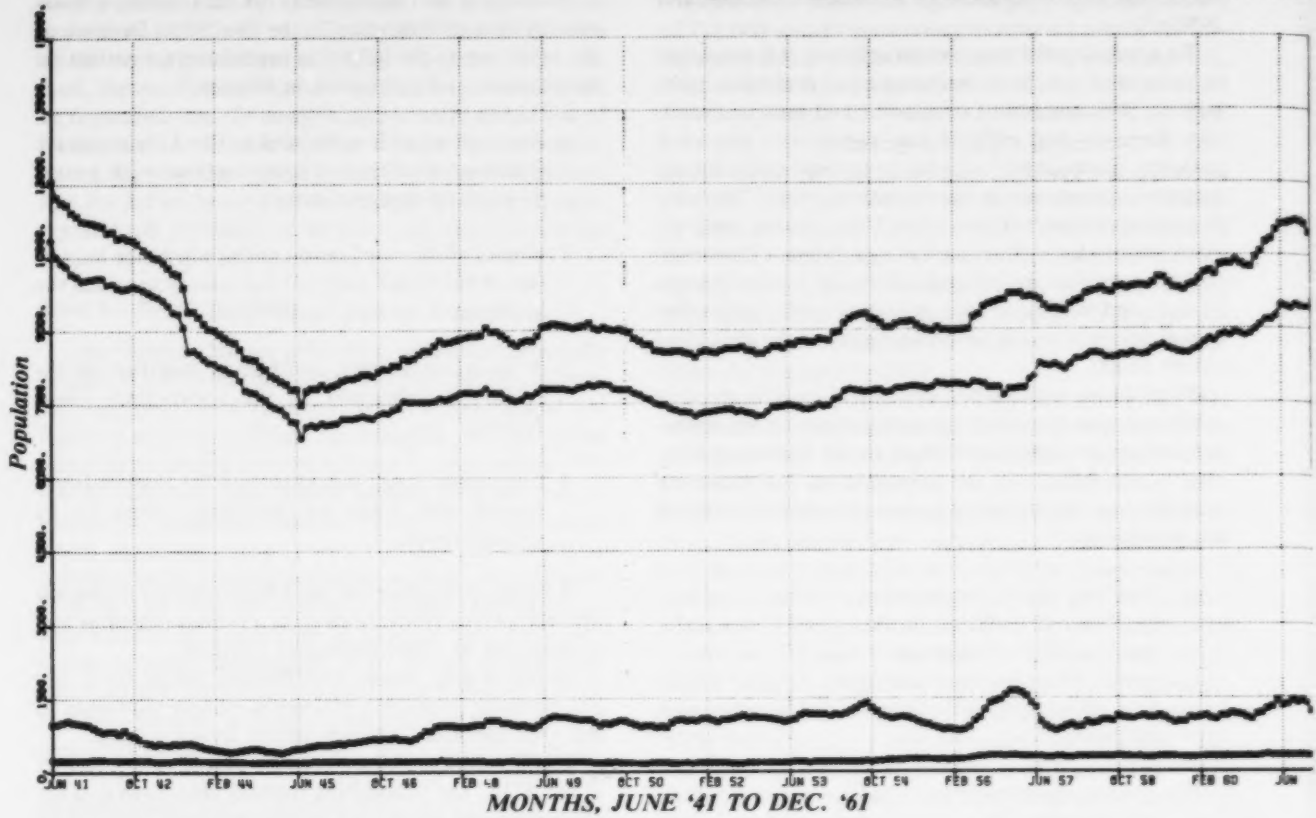
[9] Administrative Office of the Illinois Courts, *Administrative Regulations Governing Minimum Qualifications for Illinois Probation Personnel* (Springfield, Illinois: State of Illinois, n.d.) p. 3.

[10] Ibid., p. 6.

[11] Administrative Office of the Illinois Courts, Probation Division, *Personnel Hiring/Promotion Regulations for Probation/Court Services Professional Personnel* (Springfield, Illinois: n.d.), pp. 9-13.

[12] See Joan Petersilia, "Probation and Felony Offenders," *Federal Probation*, vol. XLIX, no. 2 (June 1985), pp. 4-9. Also, Joan Petersilia, *et al.*, *Granting Felons Probation: Public Risks and Alternatives* (Santa Monica: The Rand Corporation, 1985).

FIGURE 1. ILLINOIS DEPARTMENT OF CORRECTIONS



Source: Illinois Department of Corrections

have initiated intensive probation supervision, the development of which is described below.

Intensive Probation Supervision

No intensive probation supervision (IPS) programs existed in Illinois before 1984. As mentioned above, the Governor in 1983 appointed a task force on prison crowding to examine various solutions for solving the problem. One of the ideas examined, and eventually recommended by this task force, was the concept of intensive probation supervision, under which certain offenders who otherwise would be incarcerated are intensively supervised in the community. The task force recommended that 30 IPS units be established and that each unit would consist of two officers with a caseload that would not exceed 25. This program, the task force suggested, could potentially include 750 offenders, "enough to fill one prison."[13] Thus, not only would prison crowding be alleviated, IPS would also save a lot of money. The total annual statewide expenditure, the task force estimated, would be $1.6 million as compared to a state prison operating cost of $10 million.[14] The Illinois Legislature, acting with unusual haste, adopted the task force's recommendation and incorporated IPS as part of the "Act Creating a State-Wide System of Probation," signed into law on December 9, 1983.

The law mandated the Probation Division of the Administrative Office of the Illinois Courts to develop and monitor the IPS programs. Consequently, in January 1984, a staff member of the Probation Division traveled to the state of Georgia to study the operations of what was already recognized as a model IPS program.

The purpose of IPS in Illinois is "to create specialized probation units to provide intensive surveillance and service to a limited caseload of high risk, nonviolent felony offenders."[15] IPS programs were authorized in several counties to begin on May 1, 1984. The first IPS probationer was assigned to a program in June 1984.

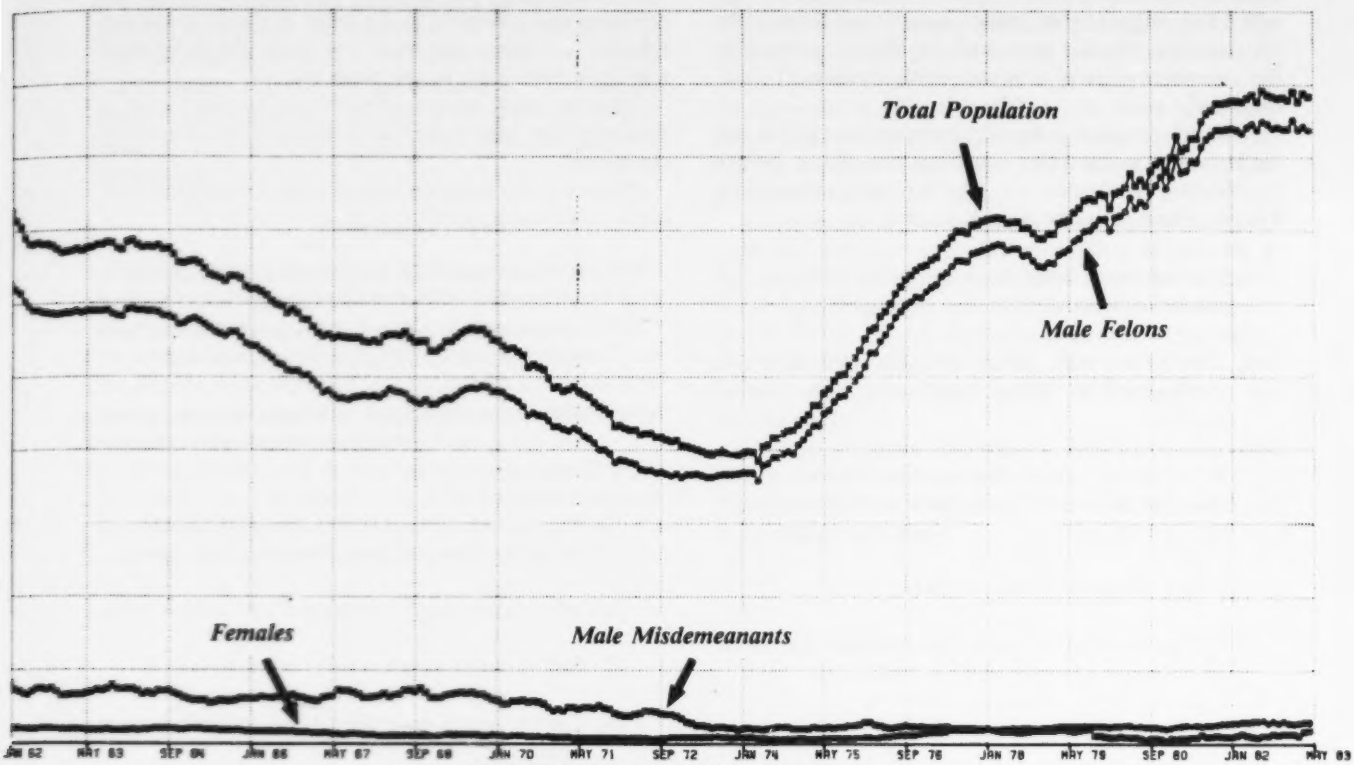
Between June 1984 and September 1985, 444 adult offenders were admitted to IPS programs in Illinois. Of

[13] *Governor's Task Force on Prison Crowding Recommendations* (Springfield, Illinois: State of Illinois, September 1983), p. 9.

[14] Ibid.

[15] Administrative Office of the Illinois Courts Probation Division, *Progress Report Implementation of Public Act 83-982*, April 1985, p. 3.

ADULT PRISON POPULATIONS, JUNE 1941—APRIL 1983



MONTHS, JAN. '62 TO APR. '83

those, 90 percent had served time in prison. Of the 106 offenders discharged from the programs, 3 received unconditional discharges, 21 were placed on regular probation, 60 offenders were returned to prison, 8 absconded, and 9 were listed as "other." As of September 1985, there have been 67 juveniles admitted to IPS programs. Of the 11 juveniles discharged, 6 were remanded to prison, 1 to unconditional release, 1 to regular probation, and 3 have absconded.[16] Although the failure rate is high, these statistics are preliminary and inconclusive. We are making no attempt to evaluate the success or failure of IPS in Illinois at this time.

Intensive Probation Supervision in Cook County

Adult Probation. The IPS program of the Cook County Department of Adult Probation began in the fall of 1984. As of this writing, there are eight probation officers and one supervisor assigned to the program.

Prior to the initiation of the program, the judges in the Criminal Division agreed that, except on rare occasions, the initial determination as to who is a potential candidate for IPS would be made by the probation department rather than the judiciary. It was also agreed that candidates for IPS would be first sentenced to prison and then resentenced to the IPS program for a minimum of 1 year. The IPS unit screens all offenders convicted of Class 1-4 felonies in the Criminal Division. After receiving preliminary information on the offenders, the unit begins to eliminate candidates from consideration. Those eliminated usually are offenders convicted of violent or drug-related offenses or are repeat offenders. In order to establish eligibility, tests are administered to determine possible drug or alcohol problems, information related to employment is verified, juvenile and other records are reviewed, etc. An offender may be eligible if he or she does not pose a danger to the community and does *not* qualify for regular probation. Once eligibility is established, a so-called "eligibility letter" is submitted along with the presentence investigation (PSI) to the sentencing judge. The judge then considers whether to sentence the offender to the IPS program. If the judge decides to use the program, the defendant is sentenced

[16] Administrative Office of the Illinois Courts, Probation Division, Internal Memorandum by John Dreiski, dated September 19, 1985.

to the Illinois Department of Corrections. In the meantime, the IPS unit prepares a detailed supervision plan, which is submitted to the judge for approval. If the judge considers the offender acceptable for IPS, he resentences the defendant to the program, with mandatory conditions.[17]

The IPS program is based on three phases. The offender must successfully complete one phase before "graduating" to the next one. The first phase lasts at least 3 months and includes the following:

1. Face-to-face contact between the probationer and the IPS officer at least five times per week.
2. The probationer must submit verification of employment or attend appropriate job training courses.
3. A 7 a.m. to 7 p.m. curfew must be observed, unless employment or community service obligations alter the requirement.
4. Arrest checks are made weekly.
5. The probationer is required to perform a minimum of 60 hours of community service.
6. Drug testing may be conducted.

The second phase lasts from 3 to 6 months. Phase II standards are reduced to include face-to-face contact three times per week, more relaxed curfew regulations, and 40 hours of community service. Employment verification, arrest checks, and drug testing are continued. The third phase lasts a minimum of 6 months. All the previous standards are maintained but at a less intensive level. After successfully completing the three phases, the probationer is returned to court for placement into regular probation to complete the sentence.[18]

Juvenile Probation. The IPS program in the Juvenile Court of Cook County began on July 1, 1984. The program was initiated as a dispositional alternative to incarceration for delinquent minors between the age of 13 to 17, who have had no history of "violent behavior or severe psychological disturbance.[19]

As of this writing, there are four two-member teams of probation officers and one supervisor assigned to the IPS unit. Referrals to this unit are made by field probation officers after the adjudication of a case. Once a delinquent minor is accepted for IPS, the judge is notified of the availability of this alternative. A supervision plan is prepared and presented to the judge at the dispositional hearing, and the judge may then order the delinquent minor to participate in the program.

Like the adult system, the IPS at Juvenile Court is based on three phases, each of which must be successfully completed.

Phase I of the program lasts at least 4 months and includes the following:[20]

(1) A conference with the minor and his family in which the program is explained and the family's cooperation is elicited. This conference is held before the dispositional order is entered.

(2) The delinquent minor is incarcerated for up to 30 days in the Cook County Temporary Juvenile Detention Center.

(3) Face-to-face contact between the probationer and the IPS officer at least five times per week.

(4) School attendance is verified at least once a week.

(5) Employment opportunities are explored.

(6) Curfew restrictions are verified at least twice a week.

(7) Arrest checks are made.

(8) Performance of community service, when required, is verified.

(9) Participation in group sessions, when appropriate.

(10) Driving privileges are restricted.

(11) Additional restrictions or requirements are imposed.

The second phase lasts from 3 to 9 months. There is no incarceration period included, but all the other standards are enforced, though at a reduced intensity. After the completion of the first two phases, each case is evaluated to determine eligibility for Phase III. During that phase, the above standards are further reduced with the expectation that the case will be transferred by the judge to regular probation.

The IPS program also includes 10 clearly defined sanctions that can be imposed on the IPS participants. Some of these sanctions involve stricter curfew, home deten-

[17] Richard G. Napoli, "Intensive Probation Supervision Program." A report prepared by the Chief Probation Officer, Cook County Department of Adult Probation. Delivered before the Illinois Academy of Criminology on April 24, 1985.

[18] Ibid.

[19] Juvenile Court of Cook County, *Report 1983-1984* (Chicago: Circuit Court of Cook County, June 1985), p. 11.

[20] *Ibid.*, p. 13.

tion, incarceration in the detention center, and revocation of participation with consequent commitment to the Illinois Department of Corrections for incarceration. If a probationer is arrested for a felony offense, a violent misdemeanor offense, or possession of a dangerous weapon, participation in the IPS is revoked and the probationer is remanded to the Illinois Department of Corrections.[21]

Conclusion

Historically, probation in Illinois was decentralized and controlled by the judiciary. Probation officers were more often than not politically appointed and paid by the counties they worked in. There was no uniformity in the distribution of money, no standards of employment and promotion, and no standardized procedures and policies for providing services.

Although the need to reform the system was obvious for many years, all plans to unify and standardize probation service by establishing a statewide system were defeated. The groundwork for change was stimulated by the LEAA Program. In recent years, however, the problem of prison overcrowding created a favorable climate for compromise. Consequently, beginning in 1978, the Illinois Legislature passed several reform measures, of which the two most important were signed into law by the Governor in 1979 and 1983. Under these laws, probation departments in Illinois remain under local jurisdiction but are governed by more uniform and standardized procedures set by the state.

As explained in this article, salaries for probation officers and administrators are now either subsidized or paid in full by the state, minimum employment and promotion qualifications, as well as hiring procedures, are decided by the state, training programs for all probation personnel are state-mandated and monitored, and specialized services, such as the IPS programs, are state-funded.

Though problems still remain, and the effectiveness of the new procedures and programs must still be evaluated, a new era with positive directions has dawned in probation in Illinois.

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[21] *Ibid.*, p. 13-14.

News of the Future

Research and Development in Corrections

BY JOHN P. CONRAD

Davis, California

Facing the Facts in Ohio

DURING THE troubled seventies and early eighties, the Federal courts could claim paternity for nearly all penological innovations. Prisoner grievance systems, intensive probation supervision, overdue new building programs, due process in the administration of discipline, and nonpolitical personnel recruitment standards were exacted by impatient judges. No doubt some of these changes would have eventually come to pass with the march of civilization, but it was mighty helpful to have a gowned Federal district judge prodding legislatures and administrators to get on with doing what had to be done.

Those days are passing; the most outrageous abuses have been relegated to the grotesque history of un-Americana. With a more conservative moral climate and dwindling public sympathy for convicts, it seems that most judges will satisfy themselves that an acceptable condition of austerity in prision life has been reached. Futher ameliorations can be safely left to the enlightenment of the state legislatures.

That was the gist of a message delivered by my old colleague, Professor Simon Dinitz, to a conference I attended last July convened by Director Richard Seiter of the Ohio Department of Rehabilitation and Correction. The department's managers, with the assistance of outsiders such as Dinitz, Aaron Brown, Norval Morris, Joe Palmer, Morris Thigpen, Anthony Travisono, and me, had been summoned together to consider what could be done to make confinement in an Ohio prison not only endurable but potentially useful to society and to any convict minded to use his time instead of merely doing it.

As usual, Dinitz was almost certainly right about the torch passing from the judiciary to the legislatures, though the final verdict must be left to history. We might therefore assume that state correctional departments could safely lapse into a state of well-earned policy stagnation, making the understandable excuse that intolerable levels of overcrowding had to be managed and boats had better not be rocked. Certainly there is only one state aside from Ohio that would have a better excuse for standing pat; only the prisons of my own state of California are more overcrowded.

Seiter and his staff have spent 3 years improving the long-range prospects for Ohio penology. In a state that has been sorely tried fiscally their accomplishments are surprising. A prison-building program budgeted at $638 million has been authorized. That will add 9,000 new beds to the approximately 13,500 beds that they inherited from their predecessors. With this increment, the system will be able to accommodate the present 21,750 prisoners and keep pace for a year or so more with a population that is projected to increase about as follows:

July 1987: 23,900
July 1988: 24,800
July 1989: 25,500
July 1990: 26,100
July 1995: 28,300.

From my perspective, totals like these are hard to digest. When I left Ohio in 1978, the prison population ran to less than 15,000 and that seemed an unacceptable bloat. We scarcely knew what to do with that modest number. Now that those numbers are doubling, the difficulties increase logarithmically. Overcrowding will be resumed soon after all the building is complete. Will Ohioans again lavish new construction on their penal system?

At present, the weekly intake averages about 220; releases are fairly steady at 195, making a weekly gain of 25 prisoners, down from 35 prisoners 12 months ago. The new Ohio determinate sentence law provides for flat terms ranging from 6 months up to 2 years, with time off for periods served in jail awaiting sentence. The result is that at any time there will be about 2,000 men and women serving very short terms, with consequences for the system that I will discuss later. At the other end of the range is a steadily increasing number of prisoners who will be incarcerated for much longer terms than were imposed under the old laws, some of them for the rest of their lives.

Those are the key numbers with which Seiter and his staff must work. The fundamental problem of space and beds will be solved for a few brief years. The massive building program has been thoughtfully designed. There

will be nine new prisons for long-term convicts, four facilities for the short-termers I mentioned above, and four pre-release centers. The largest new plant, planned for long-termers, is designed for 1,000. The rest are mostly about 500, with two in the 650-750 range. Everything is due to be in place by the end of 1988. For any state this expansion would be a remarkable achievement. For Ohio, a seriously damaged victim of recession, it is astonishing. Not only has the money been found, but in this geographically compact state, prison sites have been located without arousing implacable hard feelings from the neighbors. Moratorium advocates may deplore this investment in retributive justice, but humanitarian realists will be grimly satisfied that what had to be done has been done. If some Ohioans have to be locked up, they will survive the experience in conditions that do not further degrade them.

Having taken care of first things first, Seiter and his colleagues have set about the unsolved, and perhaps unsolvable, task of transforming the Ohio prisons from human rubbish heaps to switching-stations in which a prisoner may change career-tracks if so minded. And that brings me to the Ohio Plan, which is what the news is all about for this issue.

The Ohio Plan

Conferences are rather like banquets. Some serve rubber chicken, some serve meat and potatoes, and a few startle the guests with a smorgasbord of exotic fare that no one present has ever seen before. This one was meat and potatoes. We talked about educational programs, vocational training programs, and prison industry. Same meat and same potatoes, but the gravy was different. Nobody talked about the rehabilitative ideal, nobody peddled a theory for the treatment of psychopaths, nobody mentioned a probable reduction in the rates of recidivism as the "pay-off" for Dr Seiter's brave new penology.

What Ohio proposes to provide for each convict is enough "meaningful" activity to keep him or her busy preparing to compete for employment in a job market that has a steadily decreasing number of opportunities for the unskilled worker. Everybody has to work—that's mandatory. Another mandatory feature of the Plan is that illiterates and semi-literates are required to learn to read. Anybody arriving at an Ohio prison with an Adult Basic Education (ABE) score of 4.0 or less must go to school. That's for a starter. The staff is thinking about going for a higher score.

The rest of the Plan calls for a voluntary approach. Prisoners who want to qualify for jobs in Ohio Prison Industries (OPI) must either do so on the trade skills they've brought with them or they must complete the vocational training necessary for an industrial job. Prisoners who do not qualify for OPI will be employed in institutional service jobs. The difference between OPI employment and service employment is basic. OPI jobs pay hourly wages, institutional jobs pay pittances. Some of the service jobs will call for advanced skills—carpentry, plumbing, food services—which will stand the released prisoner in good stead when he starts looking for a respectable living, but they will still be woefully underpaid while in prison.

The orientation is to the here-and-now. Regardless of the value of the Plan for transforming convicts into citizens after their release (which may be considerable in a full employment economy and negligible when unemployment is in the double digits), the idle prisoner will not be tolerated. Convicts have to be doing something "meaningful." A large idle gang is idle so far as the warden and the captain are concerned, but as busy as can be with illicit activity, much of it leading to institutional violence. With 25 to 30 thousand men and women to contain, Ohio must provide programs or containment will fail. In planning for full prisoner activity, Ohio's administrators expect fewer heroics on the guard line when the terrible emergencies of the idle prison erupt in the cell blocks.

The Meaningful Porter and the Hustling Ethic

All Ohio prisoners are to be assigned to "meaningful jobs." That's basic. But what is such a job? That question need not arise in a prison industry in which the administration of the prison and the management of the shops have not sunk into the usual featherbed. That drift can be resisted, especially in industries that have been installed by outside corporations, as in the Free Venture shops in Minnesota prisons. The OPI people were firm in their determination to resist over-assignment, and I'm sure that Dr Seiter will support them.

I was not so sure about the service sector. At one point I recounted my observations of the mess hall at the Indiana State Prison at Michigan City, where, a few years ago, I had a depressing but significant dialogue with the chief steward. He told me that over-assignment to the mess hall was so serious that he had several times as many men as he could keep occupied. His solution was to assign one four-man table to each man and require him to clean it up after each meal—a task that might occupy him for five whole minutes out of the day. Yet the Captain's assignment board would show that all these men were on full-time assignments.[1] Was such a job meaningful, I asked?

Well, perhaps, came the answer from a stout custodial veteran. If the prisoner working his table does a good

[1] I hasten to stress that this observation took place in the recent but not immediate past. No doubt this absurd situation has been corrected many months ago.

job, is encouraged to do so and praised when he does, then he is getting a job experience that he may never have had before. After all, its's the quality of the work that counts, not the mere number of hours that the prisoner puts in. A man who has learnt to take pride in his work has learnt something that will help him keep a regular job when he gets out, right?

Wrong, of course, but how do you say that to a solid custodial citizen with 20 years of experience in supervising convicts in just such job situations? Someone else chimed in with the example of the porters, the men who are assigned to keep the cell-blocks clean. These fellows have somewhat more exacting assignments than the Indiana mess hall orderlies—they put in a half-hour stint three times a day and are on call for extra duty when more litter and trash has to be cleared out. Can't do without them, the stout fellow in the back row pointed out, and there were a number of heads nodding agreement. Why not? Are there reasonable alternatives?

Here is where the whole Plan can and will founder if the planners cannot deal with the realities of a lingering custodial tradition and the culture of the contemporary convict. An example of the tradition, drawn from the recollections of an ancient penologist: Long ago, when I began my career as a parole officer, I had to interview a young man about to be released from San Quentin so as to find a job for him. I thought it was appropriate to ask what kind of work he had been doing during his time in the joint. He replied that he had been assigned to the "waterfront," at that time a warehouse for incoming supplies. What kind of work did he do there? "Look, Mr Conrad," said he, "you got to understand. *Nobody* works at San Quentin. Nobody." I found out that he wasn't far wrong. Guards sat at their posts, and prisoners sat in the yard or in their shops. Inactivity was the rule, and both guards and prisoners knew how to accept it.

A tractable porter is a man who knows his place, does what little is required of him, and develops an amiable relationship with the guard supervising him. Not a bad job for an elderly lifer and absolutely ideal for the young hustler, allowing him plenty of time to work out deals, promote contraband, and otherwise engage in activity that's meaningful for him if not for the prison planners. His supervisor can laud to the skies his efforts on the block, but it's still a stupid assignment to work that can never be other than meaningless.

What is overlooked by the guard who likes a happy and indolent cell-block is the culture from which the contemporary prisoner comes. Not long ago, I spent an interesting hour with a couple of Hispanic convicts in a New York prison. Both of them had compiled formidable reputations as being hard to control and were cautiously brought into the interview room in a comprehensive set of irons. Asked what kind of work they did outside, they grinned at each other in amusement at my naiveté. Neither of them had *ever* worked in my sense of the word. Had they been better behaved they would have been typical candidates for work as cell-block porters. Unfortunately for them and for the prison, they were better thugs than hustlers.

Much was said in favor of the work ethic during those 2 days in Columbus. I will gladly enlist in a campaign to spread that word throughout every prison in the land. It has a formidable rival: the hustler's ethic. Its canon places the highest value on successful wheeling and dealing, deceptions of the Man, and impositions on suckers, straights, and dings. It comes straight from the criminal underclass outside, and convicts think they know it *pays*. The strategy for beating it has yet to be fully worked out, but one place to begin is the elimination of pseudo-jobs. Those cleanup assignments on which the hustler thrives could just as well be done by crews of "fish," the new convicts about whom much could be learnt by watching them at jobs such as these. What is certain is that the work ethic will never make it in any prison if the captain, the assignment officer, and the guards don't understand it and live by it themselves. A prison career as a porter is as meaningless as a sentence spent entirely in the idle gang. Successful hustling takes time and guile; a full-time job is incompatible with its requirements.

Out of the Penological Doldrums

The Ohio Plan is a tall order. At the least it requires,

- A massive infusion of new prison industry, manufacturing products that OPI's limited market will buy in quantity. Contracts to produce for private industry should be aggressively pursued.
- Comparable pay for comparable jobs in prison services. A good cook in the mess hall is easily worth as much to the prison as a machinist in OPI.
- A plan for those determinate-sentenced short-termers. I was glad to hear that separate facilities are planned for them, but there must be something "meaningful" for them to do. Two years of yard-birding is a destructive interlude in anyone's life.
- Investment in a comprehensive and credible vocational training program, preferably supported by industrial and trade union sponsors.
- An academic education program staffed by teachers specially prepared for the difficult roles they will have to play. They should be equipped with computerized instruction devices appropriate for adult education. There is no reason why prison education should be the somnolent ex-

perience one so often sees in prisons where the program has grudging support from the warden and his superiors in the state capital.

- A staff at each prison which understands what has to be done to make the Plan work. The requirement is nothing less than the radical change of the prison culture, beginning with the staff itself. That will take the patience that can tolerate years of small changes—no overnight triumph can be expected.

With a lot of help from their friends, a lot of understanding from the legislature, and a lot of good luck, the Ohio penologists can succeed. If they do, they will lead us all out of the doldrums in which we have languished for too long. Their success will restore a lot of confidence in a system that in recent years has not been shining brightly in the public consciousness. The progress of the Ohio Plan should be watched closely by penologists around the nation.

Looking at the Law

BY DAVID N. ADAIR, JR.

Assistant General Counsel

Administrative Office of the United States Courts

Sentences Under the Assimilative Crimes Act

RECENTLY THE United States Court of Appeals for the Tenth Circuit held that special assessments required to be imposed against defendants convicted of Federal offenses could not be applied to convictions under the Assimilative Crimes Act. See the discussion of *United States* v. *Mayberry,* 774 F.2d 1018 (10th Cir. 1985), in *Looking at the Law,* 49 Fed. Prob. 63 (December 1985). This holding was based on the court's determination that Federal special assessments were penal in nature and so do not conform to the Assimilative Crimes Act's mandate that persons convicted under the Act receive "like punishment" as if they had been convicted of the crime in state court. The decision in *Mayberry* naturally raises the question of what sentences *may* be imposed in cases prosecuted under the Assimilative Crimes Act.

The Act, 18 U.S.C. §13, provides as follows:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a *like punishment.* (Emphasis added.)

Congress originally enacted the Assimilative Crimes Act in 1825 to achieve three goals: (1) to establish a gap-filling criminal code for Federal enclaves, (2) to provide conformity in the laws governing a Federal enclave and the state in which the enclave is located, and (3) to provide persons within the Federal enclave as much protection as is afforded to those outside the enclave.

Both the language of the Act and its purpose, therefore, establish that the state statute that fixes the punishment for the offense that is assimilated should control the sentence imposed by the Federal court in prosecutions under the Act. This rule is, unfortunately, easy to state but difficult to apply. State sentencing laws are as full of special sentencing provisions and options as is Federal law. Which of these provisions are to be applied in sentencing under the Act is an issue that creates a great deal of confusion, and, although the Act was originally enacted in 1825, there is a surprising paucity of cases that treat the issue in a clear and rational way. No case that I have found provides a concise statement of a rule that can be applied in all situations. However, an examination of the case law dealing with two of the most common state sentencing provisions may provide useful guidance in the less common situations.

It seems clear that if a Federal court is going to impose a sentence like that imposed in a state court for the state offense being assimilated, the court would have to impose any state mandatory minimum sentence that is applicable under the circumstances. In general, this principle has been supported in the case law. In *United States* v. *Vaughn,* 682 F.2d 290 (2d Cir. 1982), for example, the defendant was convicted of stealing a purse from an office in the United States Courthouse in New York City. The conviction was for second-degree burglary in violation of New York law as incorporated under the Assimilative Crimes Act. New York law classified second-degree burglary as a violent felony and, for second offenders, provided for a minimum 4-year period of incarceration before eligibility for parole. Since the defendant had previously been convicted of a violent felony, the United States district court imposed a sentence of 8 years and also provided for the mandatory minimum incarceration in the sentence.

On appeal, defendant challenged his 8-year sentence as well as the 4-year minimum incarceration term. The court of appeals sustained the 8-year sentence imposed under the recidivist statute. The court reasoned that state recidivist statutes embody important local sentencing policies that should be followed when the state criminal statute is assimilated. Such an interpretation, the court held, supported the policy of providing for punishments similar to that which would be received by a person convicted by a state court for the same crime.

The court of appeals, however, vacated the 4-year minimum period of incarceration for the following reasons:

> We hold that although the federal courts are bound to apply state law in their determination of the applicable range of years for the sentence, the Act does not require further adherence to state policy concerning terms of minimum confinement and parole eligibility. Since the appellant is a federal prisoner confined in a federal correctional facility, federal correctional policies should govern the conditions for his release on parole. To hold otherwise would impose a set of restrictions on Assimilative Crimes Act prisoners different

> from the rules affecting all other federal prisoners. Clearly, the correctional administration of federal prisons would be left in disarray if state policies concerning parole, such as good time credits, were enhanced under the Act. . . . We do not think Congress could have intended to create such differences in treatment.

682 F.2d at 294.

The same result was reached recently by the Tenth Circuit Court of Appeals in *United States* v. *Pinto,* 755 F.2d 150 (10th Cir. 1985). In that case the defendant was convicted of aggravated burglary under a New Mexico statute incorporated under the Assimilative Crimes Act. The court sentenced the defendant to 7 years imprisonment and ordered him to serve a 2-year mandatory parole term as required by another New Mexico statute. The court of appeals, however, vacated the 2-year mandatory parole term on the grounds that the Assimilative Crimes Act does not require a Federal court to follow state parole policies. *And see United States* v. *Smith,* 574 F.2d 988 (9th Cir. 1978).

But shouldn't state minimum incarceration provisions be treated the same as state minimum sentences? Both are penal in nature. Both embody important local sentencing policies. The difference may be resolved by application of another important principle found to be inherent in the Assimilative Crimes Act. It has been clearly established that the Act does not permit the adoption of a state penal statute that conflicts with Federal policy. *See United States* v. *Warne,* 190 F. Supp. 645, 657-659 (N.D. Cal. 1960), *affirmed in part, vacated in part on other grounds sub nom. Paul* v. *United States,* 371 U.S. 245 (1963). This principle may be thought of as an exception to the general rule that the Assimilative Crimes Act assimilates the entire state criminal law relating to both offenses and punishments. Since an offender convicted under the Assimilative Crimes Act is subject to the corrections policies of the United States, assimilation of any state policy with regard to the minimum period of incarceration would most likely conflict with Federal parole policy. The case law has developed, therefore, to provide generally that the Assimilative Crimes Act does not incorporate state minimum incarceration periods. The Act assimilates minimum sentences, but not insofar as those sentences require mandatory minimum periods of incarceration that conflict with Federal parole policies. *See also United States* v. *Binder,* 769 F.2d 595, 600 (9th Cir. 1985).

Another notable sentencing limitation under the Assimilative Crimes Act is that the Act, by its terms, incorporates only criminal laws. It does not incorporate noncriminal consequences of criminal offenses. These are not considered "punishment" within the meaning of the Act. This distinction has been held to prohibit a Federal court from suspending the driver's license of a person convicted of driving while under the influence of alcohol pursuant to the Assimilative Crimes Act. In *United States* v. *Best,* 573 F.2d 1095 (9th Cir. 1978), the court of appeals vacated a sentence suspending a defendant's driver's license because, under California law, such suspension was deemed regulatory and not penal. California case law had established that the purpose for the suspension was to protect the public, not punish the driver. In addition, it was the Department of Motor Vehicles that actually suspended the license, albeit by order of the court. Presumably, if it could be established that suspension of driving privileges was intended to be punitive under state law, that punishment could be imposed in Assimilative Crimes Act cases.

Although all of the sentencing questions that may arise under the Assimilative Crimes Act are not answered in this discussion, the cases cited above provide a framework for determining what state sentencing provisions are assimilated under the Act. A person convicted under the Assimilative Crimes Act should be punished "only in a way and to the extent that the same offense would have been punishable if the territory . . . where the crime was committed remained subject to the jurisdiction of the state." *United States* v. *Press Publishing Co.,* 219 U.S. 1, 10 (1911). The exception to this rule is where the punishment conflicts with Federal law or policy, which often occurs with regard to correctional policy.

Use in Presentence Reports of Convictions Obtained Without Assistance of Counsel

In *United States* v. *Tucker,* 404 U.S. 443 (1972), the Supreme Court held that a conviction obtained in violation of the right to counsel guaranteed by the sixth amendment of the Constitution could not be considered in imposing sentence in a later criminal proceeding. In so doing, the Court specifically recognized that in deciding what sentence to impose, a judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." It reasoned, however, that reliance on an unconstitutionally obtained conviction is reliance on "misinformation of constitutional magnitude."

Recent case law has indicated, however, that the rule established by *Tucker* is only violated if (1) the prior conviction was unconstitutional, (2) the sentencing judge mistakenly believed it was valid, *and* (3) the sentencing judge relied upon it to enhance the sentence. *United States* v. *Williams,* 782 F.2d 1462, 1466 (9th Cir. 1986).

But what if a foreign conviction is obtained without benefit of counsel? Does *Tucker* apply to a conviction obtained in a situation in which there is no constitutional right to counsel? If an uncounseled conviction is not unconstitutional, then the first prong of the test has not been

satisfied. In fact, two courts of appeals have determined that *Tucker* is not applicable in this situation. In *United States* v. *Benally,* 756 F.2d 773 (10th Cir. 1985), the Tenth Circuit held that a sentencing judge could consider an Indian tribal conviction in which the defendant was not entitled to appointed counsel. This is so, the court reasoned, because *Tucker* applies only to unconstitutional convictions, and Indian tribal courts are not required to provide Indians living on reservations with representation by counsel in proceedings before tribal courts. Indian tribes are quasi-sovereign nations. The protections of the Constitution do not apply in tribal court proceedings. In addition, the Indian Civil Rights Act of 1968 (25 U.S.C. §1302) provides only that a person may be represented by counsel obtained *at his own expense* in tribal court proceedings. Therefore, there is no right to appointed counsel in tribal court proceedings even under statute.

If *Tucker* does not apply to the quasi-sovereign Indian tribes, it follows that it would not apply to convictions obtained in other countries where there is no right to counsel. In *Houle* v. *United States,* 493 F.2d 915 (5th Cir. 1974), the Fifth Circuit held that an uncounseled Canadian conviction could be considered in imposing sentence. The court reasoned that United States constitutional considerations cannot be imposed on Canadian proceedings.

The same principle would seem also to apply in cases of convictions of certain minor offenses where there is no right to counsel *(United States* v. *Benally, supra)* and in summary courts-martial where no counsel is required (*Middendorf* v. *Henry,* 425 U.S. 25 (1975)).

Publication 105, *The Presentence Investigation Report,* at Appendix C, instructs probation officers to verify, with respect to each conviction noted in a defendant's prior record, whether the defendant was represented by counsel or whether counsel was waived. If the conviction was obtained in violation of the sixth amendment, the court must be so advised in the presentence report.

In any conviction in which there is any doubt as to whether counsel was constitutionally required, therefore, any reference to the conviction in the presentence report should be accompanied by as full an explanation of the circumstances surrounding legal representation as the probation officer can reasonably provide. If the sentencing court is aware that there is a question regarding the constitutionality of the conviction, a determination may be made by the court as to whether the question is serious enough to explicitly decline to consider the conviction in sentencing.

Proof of Urinalysis Results in Revocation Proceedings

When the results of urinalysis are used in connection with a revocation proceeding, the question arises as to the type of proof needed to establish the results of the test. May hearsay testimony regarding the tests suffice or must laboratory personnel appear and give testimony? Two circuit cases have indicated that hearsay testimony, if the court finds it reliable, may be sufficient to establish the results of a urinalysis.

In *United States* v. *Penn,* 721 F.2d 762 (11th Cir. 1983), the district court had admitted testimony by a probation officer concerning the results of a urine test. The probation officer had taken the sample and submitted it to a laboratory for testing. The laboratory determined that the urine sample tested positive for Talwin, a controlled substance. At the revocation proceeding, the court admitted, over the objection of the probationer, the testimony of the probation officer, the lab report, and an unsworn letter from the laboratory summarizing the results of the test.

The court of appeals rejected the probationer's argument that he should have been afforded the right to confront and cross-examine the persons who actually conducted the urinalysis. First, the Rules of Evidence do not apply in revocation proceedings. F.R. Crim. P. 32.1 and F.R. Evid. 1101(d). Furthermore, the probationer's constitutional challenge failed. The court recognized that a probationer has a sixth amendment right to confront and cross-examine witnesses against him in a revocation hearing. *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), and *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973). But that right must be balanced against any good cause that the government can show for not requiring confrontation. Good cause for not requiring confrontation may be the reliability of the evidence proposed to be introduced instead of live testimony and the expense or difficulty of producing live testimony.

The district court had found that there was good cause for admitting the hearsay evidence of the laboratory reports, namely the accuracy and reliability of the testimony. The laboratory reports were regular reports of a company, the business of which was to conduct urine tests. The laboratory prepared such reports with the expectation that they would be relied upon by its clients, including doctors and hospitals. The testimony of the probation officer was simply a summary of the reports, which were entitled to a great degree of credibility.

The court of appeals held that, based on these factors, it could not be said that the district court's determination of the reliability of the testimony was clearly erroneous. In addition, there was some corroboration of drug use on the part of the probationer. The revocation was affirmed.

In *United States* v. *Bell,* 785 F.2d 640 (8th Cir. 1986), the court of appeals relied on the *Penn* case to reach a similar result. The court held that there was good cause to dispense with live witnesses to testify concerning the

urinalysis. Bringing the chemists who conducted the test to the hearing would have been difficult or expensive, and the testimony offered was reliable and accurate.

These cases should be contrasted with *United States* v. *Caldera,* 631 F.2d 1227 (5th Cir. 1980) (per curiam), in which the court reversed a probation revocation based upon hearsay testimony of an urinalysis. As noted by the court in *Penn.*, the testimony in *Caldera* was by a police officer who had no part in the preparation or analysis of the tests. It is also worth noting that the discussion of the question in *Caldera* is quite short and contains little analysis of the legal issues.

Penn and *Bell* are more thoroughly reasoned cases and stand for the proposition that it is not always necessary to subpoena chemists who conducted an urinalysis to testify as to the results of the urinalysis. If the court is going to rely on hearsay evidence, however, it must find that there is good cause to dispense with the live witnesses. As the cases cited show, good cause may consist of a showing that presenting the live witnesses is difficult or expensive and that the testimony proffered is accurate and reliable.

(N.B. The United States Court of Appeals for the Seventh Circuit has recently held that a special condition of probation requiring a probationer to submit to urinalysis was a valid condition of probation in appropriate circumstances. *See United States* v. *Williams,* 787 F.2d 1182 (7th Cir. 1986).)

Quasi-Judicial Immunity After Cleavinger v. Saxner

The recent Supreme Court case, *Cleavinger* v. *Saxner,* _____ U.S: _____, 106 S. Ct. 496, 88 L.Ed.2d 507 (1985), has generated a great deal of interest among persons working in the criminal justice system. In that case, the Supreme Court refused to extend absolute judicial immunity to members of a prison discipline committee. The three members of the committee, who were all prison officials, had found the respondents, who were inmates, guilty of several offenses, including encouraging a work stoppage at the Federal Correctional Institution at Terre Haute, Indiana. The committee ordered the inmates to be placed in administrative detention and to forfeit certain amounts of "good time." The inmates appealed the decision to the warden and then to the regional director of the Bureau of Prisons and eventually had all of the disciplinary actions overturned and their records expunged of information regarding the incident.

Nonetheless, the inmates brought suit against the members of the discipline committee, alleging that the prison officials had violated their rights under the first, fourth, fifth, sixth, and eighth amendments to the Constitution of the United States. The case was eventually tried before a jury, which found that the officials had violated the inmates' fifth amendment due process rights, and the inmates were each awarded $1,500 in compensatory damages. On appeal, the officials argued that the suit should have been dismissed on the grounds that the officials were shielded by absolute judicial immunity since they were performing a judicial function as members of the prison discipline committee. The Seventh Circuit, however, affirmed the judgment in *Saxner* v. *Benson,* 727 F.2d 669 (7th Cir. 1984).

The officials had no better luck before the Supreme Court, which affirmed the Seventh Circuit, holding that the officials were entitled only to qualified immunity. Unfortunately, qualified immunity was apparently not sufficient to protect the officials under the circumstances. (Qualified immunity protects an official against liability for an official's action unless the action clearly violated a clearly established statutory or constitutional right of which a reasonable person would have been aware. *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982).)

In refusing to extend absolute immunity to the officials, the Supreme Court stressed that qualified immunity is the norm for Federal officials and that absolute immunity is appropriate only in rare and exceptional circumstances "where it is demonstrated that absolute immunity is essential for the conduct of public business." The Court listed six factors that are characteristic of the functions that are inherently judicial as a means of determining whether absolute, in contrast to qualified, immunity is necessary:

> (a) The need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

106 S. Ct. at 501. Applying these principles to the discipline committee, the Court noted a lack of independence and of procedural safeguards. The absence of these judicial characteristics, the Court held, warranted the determination that only qualified immunity was available to the officials.

How does this decision affect Federal probation officers? Although it is too soon to know, any significant change is unlikely. Recent Supreme Court and courts of appeals decisions have made it very clear that absolute immunity is not favored. This decision is, therefore, not surprising. As noted in *Looking at the Law,* 48 Fed. Prob. 78 (September 1984), the courts of appeals of at least two circuits have held that commencing a revocation proceeding is not an action for which a probation officer should receive absolute immunity. Qualified immunity, of course, is available as a defense in suits brought

because of such actions. *See Ray* v. *Pickett,* 734 F.2d 370 (8th Cir. 1984), and *Galvan* v. *Garmon,* 710 F.2d 214 (5th Cir. 1983).

On the other hand, courts have consistently extended absolute immunity to probation officers in suits arising out of the preparation of presentence reports. Recently, in fact, the United States Court of Appeals for the Tenth Circuit has indicated that absolute immunity will apply to the preparation of pretrial services reports. *Tripati* v. *United States Immigration and Naturalization Service,* 784 F.2d 345 (10th Cir. 1986).

The holding in *Cleavinger* v. *Saxner* is unlikely to change this principle, and the Ninth Circuit, in *Demoran* v. *Witt,* 781 F.2d 155 (9th cir. 1986), has already so held in a case involving state probation officers:

> Probation officers preparing presentencing reports serve a function integral to the independent judicial process. Like parole board members, they act as an arm of the sentencing judge. . . . The duty of these probation officers is to engage in impartial fact-gathering for the sentencing judge. The officer is required by law to investigate and report to the court . . . upon the circumstances of the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment. . . . The prospect of damage liability under section 1983 would seriously erode the officer's ability to carry out his independent fact-finding function and thereby impair the sentencing judge's ability to carry out his judicial duties. (Citations omitted.)

781 F.2d at 157. The Ninth Circuit noted that the preparation of the presentence report for the use of the court is entirely different from the situation presented in *Cleavinger,* where the officials were performing decisionmaking functions independent of any judicial body.

Although the effect of *Cleavinger* on other functions of probation officers remains to be seen, it is unlikely that it will be interpreted so as to weaken the protections probation officers have against suits for actions taken in their official capacities.

Reviews of Professional Periodicals

CRIME AND DELINQUENCY

Reviewed by CHARLES L. STEARNS

"Restitution as a Sanction in Juvenile Court," by William G. Staples (April 1986). In this article, which examines the current trend toward utilizing restitution as a sanction, William Staples offers a critical and historic perspective within the context of three major trends in criminal justice.

In the juvenile court where a founding principle was the decriminalization of youthful misconduct, there has been a transition toward individualized justice and hence criminalization of the court. This trend includes the use of determinate sentencing, prosecution of youth in adult courts, and, finally, the use of monetary restitution. All these trends have a common underlying principle which holds juveniles, like adults, accountable for their behavior.

Overlaid on the concept of individualized justice is a growing concern for the victims of crime and the desire to make them whole. Whether as punishment or rehabilitation, restitution seeks to give some recognition to the claims of the victim.

Third, there is a blurring of traditional distinctions between criminal and tort law. For centuries, criminal and tort law were divided and distinct. However, there is now a coming together of criminal and tort law in which restitution represents more a criminal sanction rather than a balancing and restorative ritual.

Restitution as a sanction is evaluated in the context of these three developments, and the contemporary form of restitution is compared with its historical predecessors. In conclusion, Staples argues that methods of social sanctions, such as restitution, are not generalized to all social settings, and though restitution may provide an alternative disposition for a small number of juvenile offenders, it is by no means a panacea.

"When Law and Order Works: Boston's Innovative Approach to the Problem of Racial Violence," by Chuck Wexler and Gary Marx (April 1986). With racial and ethnic violence continuing to be a major problem in the United States, this article presents an excellent case study of the Boston Police Department's innovative approach to the handling of racially motivated crime. Considering the shortcomings of conventional approaches, this study offers some reasons for the apparent effectiveness of the program along with implications for other cities.

What had been unacknowledged and ignored became officially visible and a high priority for investigation. The first step in the process was to establish written guidelines identifying enforcement and protection of civil rights as a major department objective. Next, by the creation of a specialized unit with protection and encouragement from the chief executive, credibility was extended to those engaged in the special unit. Strategies employed included injunctive relief, intensive investigation after an incident, covert surveillance before an incident, victim decoys, and covert tests to determine discrimination.

Although one cannot say with certainty to what extent the decline was due to the program, the reported incidents of racial offenses went from 533 in 1979 to 181 in 1984. The constellation of factors that made the program work includes a committed chief, a highly dedicated group of officers, legal resources, and interagency cooperation, all items of prototypicality for use in other cities.

The authors conclude that a certain level of racial and ethnic animosity and conflict is an inevitable consequence of a dynamic heterogeneous society. Yet, a law and order approach not only can work, but it can help set a moral tone both within and outside of the police department. It says something highly important about the kind of society we are and what we as a nation stand for.

"The Potential Use of Home Incarceration for Drunken Drivers," by Richard A. Ball and J. Robert Lilly (April 1986). In this article on the potential use of home incarceration, Richard Ball and J. Robert Lilly examine the conflicting tendencies in applying legal sanctions. On the one hand, there is a thrust toward alternatives to traditional sentencing policy in an attempt to reduce system costs, while on the other hand there is a shift toward stiffer penalties.

Attention is given to the use of "slammer laws" which require mandatory jail terms with the conclusion that such laws essentially are counterproductive and have led to more problems. Before dealing with the appropriateness of home incarceration as a feasible alternative, the authors give treatment to the drunken driver problem and in the process dispel myths and conclusions that fail to stand up to critical analysis.

Policy determination problems are considered, including acknowledgement of public frustration in the face of systemwide failure to deal successfully with the driving-under-the-influence problem and which led inevitably to the demand for severe punishments, especially mandatory jailing.

One of the most serious shortcomings of current approaches to sentencing alternatives is that they do not build from any consistent theoretical position and never make clear their exact purpose. In theoretical consideration such as retribution and reformation, it is concluded that sanctioning is in essence a symbolic reprobation and social denunciation of the act itself.

Thus, home incarceration appears to possess many distinct advantages in terms of dealing with the problems behind the "drunken driver," including degree of fit, staging sequence, flexibility of initiation, and expectation of adoption.

In the final analysis, home incarceration as an alternative raises both legal and administrative issues that must be addressed. Yet, it is believed worth examination as an alternative to jail so long as there are legal protections and acceptance. It should provide the public with the sense that something is being done about the drunk driver, something more rational than retaliation. It has the potential not only for major savings but involves the public with the sanctioning system and, simply, has practicability.

JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY

Reviewed by EUGENE H. CZAJKOSKI

"Is Robbery Becoming More Violent? An Analysis of Robbery-Murder Trends Since 1968," by Phillip J. Cook (Summer 1985). The brevity of this article is refreshing in a journal which is not ordinarily noted for parsimonious presentation. The author crisply describes the issues and the findings of his research. In accordance with that style, the answer to the question contained in the title of the article can be stated as "no."

It has been readily observed that violent crime seems to be increasing, particularly violence associated with robbery. This reviewer recently had occasion to hear Claude Brown *(Man-Child in the Promised Land)* speak at a crime conference in Atlanta. Brown commented that, in his day, robbers had mentors who explained that violence was only used to facilitate the robbery. Nowadays, according to Brown, young robbers are without guidance in their trade, and violence in robbery has become gratuitous. It's no longer "your money or your life" but rather "your money and your life." The author reports that 2,000 people each year die from violence connected to robbery. With there being more than a million robberies annually, the percentage resulting in death is small. Nevertheless, robbery homicides are the major cause of the public's fear of the crime of robbery.

To determine whether robbery violence has actually increased, the author concentrated on robbery murders. In contrast to the inconsistent and unreliable reports of robbery injury, robbery murder is reported in fairly adequate fashion. His study involved 52 of the nation's largest cities with a population of more than 250,000 in 1968. In 1981, "the six largest cities (with 8% of the population) had 33% of the robberies and New York City alone had 18%." Because of inadequate reporting of homicides to FBI data collectors by the New York City Police Department, the author ultimately omitted New York City from his study—a regrettable circumstance given the scope of New York City's contribution to the problem under investigation.

Analysis was thus made of the rates of homicide and the rates of robbery in 51 large cities from the period 1968 to 1983. Examined were murders incident to robbery, murders incident to other felonies or unknown circumstances, and robberies in general. Among the ratios developed were the number of robbery murders to the number of robberies and the number of felony murders to the number of robberies. The author's statistical analysis revealed "the propensity of robbers to kill their victims increased in the early 1970's and declined in the early 1980's."

Recognition is given to the fact that conclusions drawn from the study may be questionable due to the seemingly eternal problem of the unreliability of figures reporting the incidence of crime. For example, comparison of National Crime Survey data with FBI data on "index" crimes raises the suspicion that during the 1970's the FBI count of robberies exceeded the true amount. The year 1973 appears to have been a turning point.

> Robbery murders as a percentage of both total homicides and robberies were increasing before 1973, but not thereafter. Indeed, a substantial reduction in the robbery murder-robbery ratio occurred in 1981. Thus, there is little support for the fears that there is a new breed of street criminals who cause more serious injuries and deaths in robberies. Very recent trends point in the other direction. Killing a robbery victim appears to be going out in fashion.

Because of the sensitization produced by the media and the way personal experiences are widely recounted, it seems doubtful that the public will be persuaded or comforted by the author's conclusion. Besides, perception plays heavily in these matters even when reality can be unequivocally presented. When reality is based on less than certain measurements, as in this case, then perception remains paramount. For the near future, at least, public policy in regard to violent crimes is likely to be shaped by the public belief that criminal violence is markedly increasing. Data to the contrary may never be

able to overcome the collective force of personal experience as augmented by media attention.

"Does Where You Live Determine What You Get? A Case Study of Misdemeanant Sentencing," by Thomas L. Austin (Summer 1985). Sentencing disparity would seem to be an eternal issue in the criminological literature. It wasn't too long ago, however, that disparity in sentencing was more or less acceptable because it was rationalized in terms of rehabilitation. Different sentences for persons committing the same crime, with perhaps the same criminal record, could be justified under the ideal of titrating punishment (treatment was then the vogue word) in accordance with the needs of the individual offender. The idea of fitting punishment to the individual rather than to the crime (the latter notion is now enjoying a renaissance) held sway until criminologists began to perceive that the treatment model frequently served as a curtain for undue deprivation of liberty and for fundamentally unfair dispositions. When sociologists, using sophisticated statistical tools, started measuring sentencing disparity on the basis of racial factors, their findings, at a time of heightened concern for civil rights, made sentencing disparity a very major issue. We have now evolved to a position of just desert and sentencing guidelines aimed at a rather fuzzy level of uniformity, or perhaps consistency would be a better word.

Thus, investigation of sentencing disparity has moved in many directions even though the racial impact has motivated the most significant research. With all the aspects of sentencing disparity that have been researched, little has been done on the question of how residence affects sentencing. The author here examines that issue in a small but neatly done study.

Working with the hypothesis that defendants from outside the community receive harsher sentences than defendants living in the community served by the sentencing court, the author analyzed the sentencing of 549 misdemeanant cases in a suburban district court within the metropolitan area of Detroit between December 1979 and November 1980. Among the variables employed was the defendant's legal place of residence, race, criminal history, and type of sentence (indicating severity).

Results were largely as hypothesized. The further away the defendant lives from the community served by the court the harsher the sentence, especially for crimes against the person. When it comes to blacks, however, it was found that blacks received harsher sentences than whites regardless of residence.

> In communities where consensus characterizes the norms and values of citizens and officials of the criminal justice system towards outsiders, the community will regard crimes perpetrated by outsiders as more threatening to local stability than crimes committed by insiders. Consequently, they impose harsher sanctions on outsiders. White defendants who reside outside the court district are outsiders in the literal sense of the word, while black defendants might be considered outsiders in the figurative sense of the word.

Because of its limitations, the study's value is mainly as a blueprint for further research on the issue. Utilizing more than one court district for study should enhance further research on the matter. Also important would be to investigate court districts where black residents form a majority. In the present study, blacks were a very small minority in a blue-collar community. It would be interesting to see if the insider/outsider hypothesis holds in a predominantly black community as well as it does in a predominantly white community.

Although this study raises the crucial issue "of whether local norms and values *should* influence the imposition of criminal sanctions," it is left for others to explore. The author's present findings will certainly provide those others with something on which to chew. Obviously, the issue can be further carried into the current trend of installing sentencing guidelines to smooth out local differences in sentencing. Ah, disparity in sentencing—it represents a secure livelihood for criminological researchers.

CANADIAN JOURNAL OF CRIMINOLOGY

Reviewed by VERNON FOX

"Incapacitation Policies: Their Applicability to the Canadian Situation," by Thomas Gabor (October, 1985). The virtual nihilism or senselessness in criminological theorizing and practice has produced pressures to update and develop more realistic theory and practice in order to be more effective in controlling the present day crime problem. Serious crime has risen in Western countries since the early 1960's and has gone unabated to unprecedented levels despite offender rehabilitation and other liberal programs. The rise in crime has prompted influential hardliners to stress harsh punishment and higher imprisonment, which has resulted in the prison population also reaching unprecedented levels that are still rising. From primitive vengeance and punishment to reform and rehabilitation to prisons, the evolution of criminal justice has gone from workhouse to warehouse.

During the past 8 years, many studies, primarily by Americans without criminological or social science backgrounds (operations researchers), have emphasized (1) general incapacitation and (2) selective incapacitation. Studies suggest that only modest gains could be expected of incapacitation alone. Selective incapacitation is based

on the identification of the most active and serious offenders sufficiently early so as to interrupt their criminal careers, at least while the offenders are incarcerated. In recent years, Canadian courts have become more selective in incarceration. Collective incapacitation through mandatory sentences has been found to be prohibitively expensive. Selective incapacitation entails predictive sentencing criteria that sometimes produce injustices in sentencing when only the present offense is considered. However, some exponents of selective incapacitation point out that injustices are occurring anyway, which leaves pursuit of common interests of society the optimum policy. "Magic bullets" such as selective incapacitation overestimate the criminal justice system's ability to control crime in society. Those considered to constitute the greatest threats to public safety are still to be warehoused until released, so incapacitation offers little short-term relief from crime and still less hope for the future.

"Individual Violence in Canadian Penitentiaries," by C.H.S. Jaywardene and P. Doherty (October 1985). Violence has been in prisons ever since their inception. Much attention has been focused on riots and collective disturbances, but little attention has been paid to acts of individual violence. Studies of murderers in prison indicate that murder recidivism does occur, though rarely. There is an increase in the number of murderers in prison, but those who kill in prison are not necessarily convicted murderers.

For this study, information was collected on all cases of deaths resulting from assault occurring in the penitentiaries in the Correctional Service of Canada (CSC). The incident reports and the inmate files were reviewed. During the period 1967-81, 9 staff members were killed by 6 inmates, and 66 inmates were killed during their incarcerations, 59 of whom were killed by inmates in 58 incidents. The largest number of inmates (16) was killed in Archambault, a maximum security penitentiary with a cell capacity of 461, considered a large prison in Canada. The study suggests that homicide in Canadian penitentiaries involves young men who have demonstrated proneness to violence, and a relatively large number of victims are of French-Canadian ancestry. Half the homicides occurred in the cells, and the second most frequent place was the TV room or the gymnasium during a film or concert. The most frequent time was between 8 p.m. and midnight. Most were stabbed (69.5 percent) or beaten (20.3 percent). The shortcomings of this study were that (1) it was very difficult to ascertain motives for these homicides, and (2) personality characteristics of the offenders were not considered. A psychological typology will be the focus of the author's next study.

"The Nature of Education Within Canadian Federal Prisons," by Bill McCarthy (October 1985). Since the first Canadian penitentiary was established at Kingston in 1935, education has been considered a major function. Education is not for a utilitarian purpose, indoctrination, or training, but to satisfy intellectual curiosity and develop the strength of reason. Historically, the early education at Kingston was limited to reading and writing, with the Bible being the primary text and the chaplain being the teacher. A report by the chaplain in 1942 recognized the futility of education for religious reasons as a reform ideology, but the report was ignored. The strength of the moral-religious perspective persisted when a Royal Commission on Penitentiaries report of 1914, indicating that prison has a very "crushing spiritual nature" and that broader education might be helpful, was ignored for similar reasons.

As late as 1927, educational lectures and books for private study were still not permitted. The Archambault Report in 1938 recommended complete restructuring of the school system, but none of the educational recommendations has been implemented. The same recommendations were ignored after the Gibson Report of 1947. The report of the Ontario Institute for Studies in Education (OISE) in 1978 indicated that the Parliamentary Sub-Committee that toured the institutions in 1976 made the same recommendations as did the Archambault Report in 1938. The opinions of prison administrators are reported to be that the OISE report had "virtually no time to be concerned with the problems of correctional education." The OISE report included statements to the effect that education in prisons "is patchy in operation, at times basically fumbling in implementation, and existing in an environment of half-hearted support." Prison education must incorporate a sound educational philosophy, develop rigorous programs, and promote creativity, imagination, and the maturation of thinking skills to guarantee that "the inmate is not worse off when he emerges than he was at the time of admittance."

"Criminal Intent: The Public's View," by Nicholas R. White and Julian V. Roberts (October 1985). In Canadian criminal law and other legal systems based on Anglo-Saxon tradition, persons accused of a criminal offense can not be convicted unless the prosecution can establish "beyond reasonable doubt" that they had intended to commit the criminal act *(mens rea* and *actus reus).* There have been inconsistencies in scholarly and legal opinions concerning the legal stipulations requiring proof of criminal intent. The present study was to (1) determine the extent of the public's knowledge and support of the legal tradition concerning criminal intent and to (2) examine the public's reaction when confronted with an intent defense in a theft charge.

A questionnaire was given to 145 visitors to the Ontario Science Centre in Toronto. The majority (70.34 per-

cent) favored finding the defendant guilty even without intent but recommended a lighter sentence, while about a quarter (24 percent) thought the defendant should be given the same treatment as a guilty person with intent. This left only about 5 percent favoring acquittal because of lack of intent. In the second phase of the study, 120 subjects were recruited in the same manner and at the same place as the first group. They were randomly assigned to one of three experimental conditions in which a person had stolen a watch while (1) admitting taking the watch from the store, but denying intent without presenting any supporting evidence, (2) admitting taking the watch, but presenting evidence suggesting he thought it was his own, and (3) admitting taking the watch and not using an intent defense. Fewer guilty verdicts resulted.

While the public will acquit a defendant who denies intending to commit an offense, it feels that the defendant should produce evidence supporting the claim. Public attitudes seem to be more compatible with "due diligence" that usually applies to noncriminal public welfare cases. In both the survey and the experiment, subjects responded to unsubstantiated denials of intent by assigning a guilty verdict but recommending a light sentence. The question is asked about the attitudes of jurors and of judges as they evaluate the problem of criminal intent.

"Differential Response of Juvenile Offenders to Two Detention Environments as a Function of Conceptual Level," by Alan W. Leschied, Peter G. Jafe, and Gerald L. Stone (October 1985). Detention for juvenile offenders is about the most contentious of all interventions. Some cases in the United States, such as Gault in 1967 and Winship in 1970, have responded to the need to protect young persons from alleged abuse of detension facilities. In Canada, the Young Offenders Act of 1983 reflected concern for the rights of juveniles. Differential responses of young offenders to correctional environments has been found to be an important component in understanding their needs. To assess individual responses to correctional environments, the Conceptual Level Matching Model (CLMM) was used, with CL or general ability measured by the Paragraph Completion Method (PCM) that measures conceptual level and the matching model (MM) that compared levels of structure in detention homes ranging from secure to open. Participants for the study were 60 juveniles assigned to one of two detention homes, one secure and the other open, with 20 successive males and 10 successive females assigned to each facility. Factors reflecting adjustment while in detention were assessed through staff and self-ratings on the Jesness Behavior Checklist (JBCL) and the Basic Personality Inventory (BPI) as a measure of personal adjustment. Two levels of CL and two levels of detention structure were used.

Followup data were collected 3 months after discharge from the homes. It was found that juveniles respond differently to differences in detention homes, with some of the differences related to mismatching for high CL juveniles. Greater confidence in present methods is found with younger juveniles. Decisionmaking by judges is frequently based on their perceptions of the juvenile's last stay in detention, rather than on evaluation by family court clinics. The disproportionately high numbers of behavior incidents among the older juveniles may reflect their reaction to the overly oppressive and restraining environment of secure detention. Where random assignment is not available, contribution may be made by understanding more clearly the factors used in decisionmaking by the judiciary.

"Yukon Restitution Study," by Michael Kim Zapf and Bob Cole (October 1985). While restitution enjoys wide support from the public, the observation has frequently been made that it is not a feasible sentencing alternative within the present system. With a research grant from the Federal Department of Justice, the Community Corrections Branch of the Yukon Justice Department conducted a study in Spring 1985 to provide quantitative information about ordering, compliance, and enforcement in the Yukon Territory. Restitution and atonement were parts of the ancient codes and practices, but by the substitution of the State for the individual in criminal procedures under the feudal system and afterward, the criminal justice system is designed to protect society, rather than the individual. The Law Reform Commission of Canada in 1974 described restitution as a civil court action and stated that it has become "an unwanted child of the civil process" in the criminal courts.

The Yukon Territory is triangular in shape, about half the size of Ontario. It has a population of 25,000, about 60 percent of which live in Whitehorse; the remainder live in small communities throughout the vast territory. In the 2-year period, April 1, 1981 to March 31, 1983, there were 1,473 probation orders made of which 323 (22 percent) involved restitution. The Probation Services and the Court Registry files were examined, and data on 319 cases involving restitution were coded and processed through the Statistical Analysis System (SAS). The results showed 194 (60.8 percent) paid in full, 12 (3.8 percent) partially paid, and 113 (35.4 percent) unpaid. A higher compliance rate (68.2 percent) was found in the rural areas than in Whitehorse (55.9 percent). Enforcement of unpaid restitution orders proved to be less effective in the Yukon than expected. Of the 125 unpaid cases, no breach charges were laid in 88 cases. No charges could be made on willful refusal to pay in 42 cases, 19 had left the jurisdiction, and 2 had died. Many records showed no discussion of breach considerations, leaving the possibility that restitution had been lost or forgotten. Of the 37 cases where charges were laid, the charges resulted in conviction and

sentencing. In only three of these cases, restitution was ordered collected like other debts. The victim has no legal guarantee of payment. The return to the civil court for enforcement may be the first step in a return to a common sense concept that could be supported by everyone. A small jurisdiction like the Yukon might be a logical place for a pilot project to determine costs, effectiveness, and satisfaction in criminal restitution procedure.

"Public Estimates of Recidivism Rates: Consequences of a Criminal Stereotype," by Julian V. Roberts and Nicholas R. White (July 1986). The component of the criminal justice system that attracts most criticism from the public is the court and perceived sentencing trends that are too lenient. Deterrence finds support in the public, but recidivism rates as a measure of the crime-control mechanism have resulted in two different expectations: (1) exaggerated views of crime rates resulting from biased reporting in the news media and (2) some more specific indicators of crime, such as the sex ratio of offenders, that result in more accurate estimates. The point of departure for this research was in two questionnaires in a nationwide survey in Canada reported in 1983 that requested estimates of recidivism for property offenders and person offenders. The responses indicated that 60 percent overestimated the recidivism among property offenders, and 79 percent overestimated the recidivism among violent offenders. The present research was designed to determine: (a) how public estimates of recidivism compared with official figures, (b) whether estimates of recidivism rates are related to dissatisfaction with sentencing patterns, (c) if exaggerated estimates of recidivism are associated with high media usage, and (d) if the public is sensitive to the diversity of criminal recidivism.

Two patterns of data stood out from the surveys: (1) the public overestimated the proportion of first-time offenders who are reconvicted and (2) the respondents' estimates did not vary from first-to third-time offenders. The experiment demonstrated that public estimates of recidivism rates were not affected by a variety of relevant offender characteristics. The public's view of crime is very different from that derived from official statistics. Policy makers should carefully assess the oft repeated refrain that sentences are too lenient. One way of reducing widespread dissatisfaction with sentencing trends may be to provide the public with more accurate information about recidivism rates.

"De la délinquance juvénile à la probable absence de criminalité adulte: le délinquant temporaire insignifiant (D.T.I.)," by Pierre-Marie LaGier and Sonia Dickner (July 1986). The problem of predicting delinquent behavior has concerned criminologists for some time. The seriousness of delinquency varies widely in terms of the damage it does to society and in the viewpoint of the juvenile courts. This study reviews the parameters capable of facilitating classification of less serious offenders whose delinquency is of little gravity compared to that of more serious offenders.

The sample was 30 boys identified as "délinquant temporair insignifiant" (D.T.I.) or less serious delinquents divided into two groups: (1) of boys 15 to 17 years of age and (2) of boys up to 19 years of age, taken from a larger sample of 390 boys in the Cour du Bien-Entre social (now the Tribunal de la Jeunesse) in Montreal in 1983. About 45 variables were assigned all boys in the sample that included data from interviews, police and court records, and psychological tests. The younger D.T.I.'s showed scores and other data more approaching normality than did the entire sample, including scales of socialization (SOTOT), alienation (ALI), a social comportment (COMASO), less resentment about poor family origin (RFA), less general anxiety (IPATOT), and other scale and demographic data. The D.T.I.'s over 17 up to 19 showed similarly lower scores, but they were less significant. The personality profiles of the D.T.I.'s or less serious delinquents showed more normal personality profiles than the other delinquents. The twofold approach at two different stages or age levels of adolescence does show differences based on data from interviews and official records, on the one hand, and the structure of personality, on the other. There is a difference between normal personality and the personalities of delinquents and other offenders, which means that different kinds of preventive or curative intervention are required in delinquency control. This is the basis of clinical criminology, which has long been proposed by many criminologists.

"A Study of Perceived Drinking-Driving Behavior Changes Following Media Campaigns and Police Spot Checks in Two Canadian Cities," by Ronald Kivikink, Bernadette Schell, and Gregory Steinke (July 1986). Drinking-driving is a serious social problem throughout the world. It is reported to be one of the most frequently committed crimes in the United States. Yet, it is estimated that 95 percent of legally impaired drivers go undetected. Research evidence suggests that there is no single approach to deal effectively with it. Noticeable voids in the literature are that (1) most research includes only one city so generalizations are limited, (2) citizens' attitudes about countermeasures are frequently downplayed in favor of "statistical" reductions, and (3) attitudes within the alcohol-consumer group have not been explored.

In this study, two Northern Ontario Canadian cities were chosen to study because they had established information campaigns and local roadside police spot checks. The larger city had a population of 97,000 and the smaller, 45,000; both were English- and French-speaking. Data were collected following the 1983 "blitz" with a

questionnaire to determine drivers' readiness to internalize this information, drivers' perceived short-term behavioral change, and drivers' long-term change. The hypotheses tested were (1) high-esteem drivers would be more likely to change, (2) whether the message were internalized or not would depend upon the drivers' degree of ego involvement and the degree of message clarity, (3) "legally aware" drivers would be more likely to perceive change and reach "insight," while less aware drivers would take longer, (4) spirit drinkers would be less likely to change than beer and wine drinkers, and (5) there would be no significant difference in the responses from the two cities.

Nine hundred adults were randomly selected from the 1983 Vernon City Directories for the two cities, and questionnaires were mailed to all. The return rate for the larger city was 27 percent and 25 percent for the smaller one. The second timeframe, behavioral change, was by a simple yes-no question with some followup questions. The third timeframe, analyzing long-term behavior, was also asked by simple questions. The 196 respondents from both cities showed that the majority (85 percent) thought drinking-driving was a problem; 91 respondents (47 percent) perceived short-term changes in behavior, and 103 respondents (53 percent) did not think their behavior would change because they do not now drink and drive. The most effective message was seen as television shows and the second was police roadside checks. Messages that people could relate to were most effective, such as People to Reduce Impaired Driving Everywhere (PRIDE). Further study should be made of the decoded messages by social action groups because the evangelistic tone of some "turn off" people. The messages were less effective on higher educated people, which raises the question as to whether the messages were too simplistic or whether drinking-driving is too well entrenched in this group.

"The Implementation of a Robbery Information/ Prevention Program for Convenience Stores," by Ronald Roesch and John Winterdyk (July 1986). Although robbery of convenience stores is not as significant as some other crimes, it is a potentially violent crime involving psychological and physical trauma to the victim(s). Vancouver has experienced a relatively steady increase in these robberies, and the clearance rate has dropped from 29.5 percent in 1977 to 23.4 percent in 1983, despite new crime prevention endeavors and an increase in the police force. Vancouver seems to complement those figures for Canada as a whole. In 1981, the Vancouver City Police, with assistance from other agencies, implemented a pilot Robbery Information Program (RIP) to assist in reducing the risk of robbery. The Robbery Prevention KIT (RPK) contained a number of posters and decals on what to do in case of robbery. For this study, police records were collected for 37 months during which about 300 robberies occurred and 103 interviews with managers of all convenience stores were recorded. Stores whose owners participated in the prevention programs tended to have a lower robbery rate. Based on this study, it was recommended that store operators be encouraged to participate in the program, that apprehended robbers be interviewed to determine their perceptions of the prevention program, that store customers be similarly interviewed or surveyed, that police should keep more detailed records, and that the description by eyewitnesses form now rarely used be promoted.

"Delinquency Prevention Through Promoting Social Competence in Adolescents," by Chok C. Hiew and Greg MacDonald (July 1986). The purpose of primary prevention is to develop a personality capable of coping with stressful conditions without resorting to deviant behavior. Since unemployment is a major stressor linked to physical and mental illness, alcoholism, and crime rates, competence training for adolescents to enable them to obtain partial employment would be a primary prevention intervention. A literature review reveals that the single most important variable in selection is the job interview. There is substantive research that shows that a social skills training (SST) approach based on modeling, role playing, practice, feedback, coaching, and social reinforcement develops job interview skills. With the local Chamber of Commerce, a training program in this area was developed in the local high school with a support network of local employers.

Participants in the program were students 15 or 16 years of age in grades 10 or 11, who had expressed interest in employment but who had never worked. Forty students were selected and randomly assigned to two treatment groups and two control groups. One treatment group was given training with contact with a support network from the Chamber of Commerce and the other treatment group had no such contact. One control group was placed on a waiting list without training, but received all the assessment procedures, while the other control group had no contact. In the second part of the training, the manager of the Chamber of Commerce conducted three sessions covering filling out job forms, important office procedures, theft and fraud, and understanding the needs of business organizations. Job counselors at the Canadian Employment Office interviewed both experimental groups and one control group and completed a 16-item questionnaire assessing each subject's performance. All subjects were asked 2 months later to complete a questionnaire about their success in finding employment. The experimental groups with training did better than the control groups in finding employment. Further, the experimental group who had had contact with the support group from the Chamber of Commerce did better than the experimental group without that con-

tact. Social skills training during adolescence did enhance the possibility of these adolescents finding employment. The general implication appears to be that person-centered approaches must be paralleled by community-level interventions through environmental programs like the support systems used in this experiment.

ARTICLES OF SPECIAL INTEREST IN LEGAL JOURNALS

Reviewed by CANDACE McCOY

Will Courts Once More Keep Hands Off Prisons?

"Reports of my death are greatly exaggerated," Mark Twain once mused. The same could be said for the much-heralded but little-observed demise of the "hands on" doctrine, which itself had been a reaction against the "hands off" doctrine. Such legal trends may seem confusing, but in practice they are quite straightforward. Prior to the 1970's, Federal courts had refrained from interfering in administration of correctional facilities despite claims of brutality and gross violation of constitutional rights. Judges kept "hands off" because prison administrators were deemed to have the greatest expertise in these matters and because judicial intervention could be interpreted as an overly activist intrusion by courts into the business of the executive branch of government.

This stance changed in the early 1970's, when Federal trial courts decided that violations of the constitutional rights of prisoners—most notably, the eighth amendment right to be free from cruel and unusual punishment—could no longer be tolerated in the name of administrative expertise. Activist Federal judges approved sweeping reform of entire state prison systems, and these actions were upheld by the U.S. Supreme Court. If the watchwords had before been "hand off," by the 1970's they were "hands on."

In the early 1980's, the U.S. Supreme Court seemed to signal a return to the "hands off" doctrine. Several observers cited *Bell* v. *Wolfish,* 441 U.S. 520 (1979) and *Rhodes* v. *Chapman,* 452 U.S. 337 (1981) as demands that trial courts return to a deferential approach to prison problems. Recent caselaw and several probing law review articles, however, demonstrate that reports of the death of the "hands on" approach are greatly exaggerated.

The U.S. Supreme Court has indeed refused to expand the "hands on" doctrine and, in recent cases covering prisoner lawsuits for money damages, has restrictively interpreted some important standards. But the cutbacks apply specifically only to cases in which money damages are requested and only in particular areas of prison life.

In the 1986 term, the Court set to rest a controversy that has been bothersome in regards to prisoners' lawsuits directly against corrections personnel. Section 1983 lawsuits[1] have been the major vehicle by which prisoners bring their complaints to court. There are two different remedies possible under this structure. The first is the most familiar: massive litigation aimed at structural reform of the prison through injunctions and court-monitored reform plans. The second has been less discussed but is more common: lawsuits by individual prisoners demanding money damages and/or injunctive relief for alleged wrongs committed by particular prison personnel. While the former type of "hands on" lawsuit was arguably curbed by *Wolfish* and *Chapman*, the latter has not been completely explicated in U.S. Supreme Court decisions.

The major unresolved question was whether prisoners can sue for damages when the wrong essentially amounts to negligence. In civil law, a defendant's state of mind in causing harm can be either negligence, recklessness, or intentional wrongdoing. If prison administrators or guards intentionally hurt an inmate, there is no question that they may be sued and held liable for such "constitutional torts." And if their actions amount to "deliberate indifference" or reckless disregard for inmates' valid needs, the Supreme Court has said they will be liable.[2] But if the wrong against an inmate is at the level of mere negligence, there has been some question whether prison personnel will be liable under Federal law.

The Supreme Court recently clarified the issue in *Daniels* v. *Williams,* 106 S.Ct. 662 (1986) and its companion case *Davidson* v. *Cannon,* 106 S.Ct. 668 (1986). In *Daniels,* an inmate sued the sheriff who administered a local jail when the inmate slipped and fell on a pillow a guard had negligently left on the stairs. That the inmate was hurt and the guard negligent were accepted by both sides in the litigation, but the legal question was whether tortious conduct by state officials constituted a Federal constitutional claim.

Unanimously, the Court held that it did not. To be held responsible for such conduct, corrections personnel must violate a *constitutional* standard, the Court said. Constitutional rights are at issue, not common law torts. However, note that the inmate here is not precluded from challenging the tortious act in state court. In *dicta,* the

[1] 42 U.S.C. Section 1983 says that "every person, who under color of [state law] causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in any action in law, suit in equity, or other proper proceeding for redress."

[2] Recent cases include *Miller* v. *Solem,* 728 F.2d 1020 (8th Cir. 1984), *cert. denied,* 105 S.Ct. 145 (1985) (reckless disregard of inmate rights cannot be justified with a good faith defense) and *Smith* v. *Wade,* 103 S.Ct. 1625 (1983) (intentional or callous indifference to inmate rights may be redressed through punitive damages.)

Court said that the Federal guarantee of due process (i.e., that no state shall deny any person life, liberty, or property without due process of law) is properly "applied to *deliberate* decisions of government officials."

Such a case can scarcely be seen as a great cutback in section 1983 law. Egregious denials of constitutional rights are still completely actionable in Federal court. The companion case, however, comes closer to restraining the "hands on" approach. In *Davidson,* a prisoner had repeatedly threatened to assault another inmate. Corrections workers did nothing to segregate the aggressive inmate, and an attack did indeed occur. Mr. Davidson suffered a broken nose and other injuries, and he sued the guards and prison officials for reckless disregard of his plight and a policy of deliberate indifference to weaker inmates likely to be victimized in prison. The Supreme Court was divided in this case. By a 6-3 vote, the Court decided that failure to protect constituted negligence, not recklessness, and thus would not be actionable in Federal court. (A particularly sad note here is that this inmate, unlike the *Daniels* plaintiff, cannot obtain redress in state court for the tortious conduct. A New Jersey statute immunizes prison officials from suit if one inmate beats another.)

Davidson can indeed be interpreted as a cutback on the "hands on" approach but only because it draws a bright line between actionable recklessness or intentional denial of rights and "garden variety" negligence. A more expansive interpretation of the facts—an interpretation more consistent with those of the many Federal district courts that have considered the issue—would have led to the conclusion that failure to protect inmates from the violence of others constitutes deliberate indifference. These Supreme Court cases do not preclude "constitutional tort" litigation, although they do tighten the standards of *scienter* to be proven before an inmate can recover damages. Moreover, such cases do not signal a wholesale return to "hands off" because they say nothing about structural reform through broad injunctive and declaratory orders.

In fact, commentators have noted that the lower Federal courts have not accepted the Supreme Court's invitation in *Wolfish* and *Chapman* to return to a "hands off" stance in structural reform cases. Two recent law review articles consider these issues.[3] They are excellent sources for prison personnel interested in recent developments in the law and statements of the current legal status of selected prison problems.

The New York University School of Law regularly publishes the *Annual Survey of American Law,* containing overviews of significant caselaw trends. This year, author Anne Jacobs reviewed cases on prison administration. Three 1984 cases from the Supreme Court demonstrate that "judicial deference to prison administrators has become the touchstone of analysis in prisoners' rights cases," she states. Yet lower courts have consistently held such cases to their facts and continued in a somewhat muted "hands on" path. The facts of these cases involved, respectively: contact visits by family members of pretrial detainees, a prisoner's right to privacy *vis a vis* shakedown searches of his cell, and right to counsel of prisoners detained prior to internal administrative disciplinary proceedings.[4] The Court supported security-related prison practices in all these instances. On any cases with identical facts arising in the future, lower courts will undoubtedly mirror this stance.

But generally, lower courts are keeping "hands on." Jacobs avers that:

> These courts accorded more weight to inmates' claims when balancing them against the interests of corrections officials, fearing that too much deference to those officials may be detrimental to the rights of inmates and to the criminal justice system.[5]

The article continues with a comprehensive overview of corrections cases decided in local Federal district courts in 1984, which certainly add up to convincing proof of the foregoing statement.

Another comprehensive article provides a good review of the "hands off" and "hands on" doctrines and an update of applicable law. Robertson's article then goes beyond caselaw to discuss actual impact of this litigation on corrections policies. Like Jacobs, the author concludes that the "hands on" doctrine will survive in the trial courts despite the Supreme Court's disapproval of their involvement in corrections disputes. Robinson perceives this as an appropriate outcome, because, he demonstrates, structural litigation against prisons and jails has indeed produced substantial, lasting reform.

Another strength of the Robertson piece is its scholarly, complete consideration of the problem of violence among inmates. The article first describes "the ecology of inmate violence"—the extent and causes of violence perpetrated by one prisoner against another. Not surprising to corrections personnel, intra-inmate violence is found to be widespread and caused by a combination of social and institutional factors, all of which are listed and considered in turn. The legal issue here is: what constitutional duty do correctional officials have to protect inmates from each other?

From an admirable list of cases, the author concludes that lower Federal courts have developed the stance that "the Eighth Amendment imposes upon prison staff a duty to use reasonable care to protect inmates from the pervasive risk of assault.[6] Yet the 1986 *Davidson* case presented above has probably negated this duty. Failure to protect inmates, the Supreme Court says, is mere

[3] Anne F. Jacobs, *Prisoners' Rights: Judicial Deference to Prison Administrators,* 1985 ANN.SURVEY AM. LAW 325 (March 1986) and James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence,* 35 DRAKE L.REV. 101 (1985-86).

[4] *Block* v. *Rutherford,* 104 S.Ct. 3227; *Hudson* v. *Palmer,* 104 S.Ct. 3194; *United States* v. *Gouveia,* 104 S.Ct. 2292.

[5] Jacobs, *supra.*

[6] Robertson, *supra.* at 109.

negligence and therefore not actionable as a constitutional tort. It will be difficult for lower courts to ignore the clear mandate of this case.

Later in his article, Robertson argues that structural litigation under section 1983, in which entire prison systems are monitored by courts but in which individual corrections personnel need not be held personally liable for money damages, is the strongest tool of reform. If trial judges wished to address inmate-against-inmate violence, *Davidson* would preclude personal liability but would not necessarily preclude injunctions ordering prisons and jails to formulate and enforce procedures designed to prevent inmate violence. Robertson offers several suggestions: classification of inmates according to risk factors, attention to predictors of violence such as a pattern of assaults, the number of prisoners seeking protective custody, and the testimony of social service workers and management experts could all help reduce inmate violence and can be mandated by injunctive orders.

Clearly, classification and segregation of inmates most likely to cause violence and also of those most likely to be victims are tactics designed to reduce physical injuries and the pervasive atmosphere of fear so common in many prisons. But classification criteria can be problematic. A short note in the summer *Criminal Law Bulletin*, for instance, considers the mentally ill inmate, who is an apt target of classification.[7] Author Fred Cohen states that the duty to classify and protect these inmates flows not only from the general due process right to be free from denial of life, but also from the right to medical treatment required by *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The article considers many facets of problems posed by incarcerating a mentally ill person.

Finally, an interesting article in the same issue of the *Criminal Law Bulletin* gives a new twist to issues of legal liability of corrections personnel.[8] Author Connie Mayer asks whether the privatization of prisons would provide a convenient method of avoiding these legal standards altogether. Contracting with private organizations to provide incarceration services has been tried in only a few institutions holding juveniles or aliens. The author reviews these instances of privatization and considers legal problems which would arise should the concept be taken further, so as to apply to adult, secure facilities currently run by state prison departments.

Obvious legal questions arise. Can the state delegate its power to incarcerate, for instance? More particularly, can it delegate its legitimate power to use deadly force? What would be a private contractor's role in the use of deadly force or even the imposition of prison discipline? What liability would attach if the private contractor did not meet the constitutional minima of prison conditions required by the caselaw discussed above? Finally, what labor law implications arise when prison operations are taken from the control of state employees and turned over to the correctional equivalent of private security guards?

Mayer states that the state cannot legally delegate these functions to private contractors, but it may be able to contract with private firms for prison services if there is some method of constantly monitoring the private contractor's compliance with high standards of training, classification, inmate services, and other regulations ordinarily required of public operations. If there would be a failure to meet these standards, the contractor would be legally liable, along with the state, in Federal court. An indemnification agreement between the state and the contractor is recommended. The article also quickly disposes of the labor law issue, stating that the National Labor Relations Act and state labor laws will cover private prison guards.

As for deadly force, the author opines that the recent case of *Tennessee* v. *Garner*[9] will apply to private as well as public prison personnel. *Garner* says that police may use deadly force against a suspected fleeing felon only if the officer's or bystanders' lives are endangered or if the offender has committed a felony involving violence and/or use of a weapon. Applied to prison situations, the latter prong of the *Garner* test would apply, although Mayer does not consider it in depth. Escapes from prison by felons who have been proven to be dangerous will properly be the subject of deadly action by prison guards, whether they are public or private.

Mayer's article is an interesting consideration of a speculative prison policy. But there is nothing speculative about the policies discussed in the other articles. Prison litigation will continue, although in constantly changing forms.

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[7] Fred Cohen, *Corrections Law Developments: The Mentally Disordered Prisoner*, 22 CRIM.L.BULL. 372 (July-August 1986).

[8] Connie Mayer, *Legal Issues Surrounding Private Operation of Prisons*, 22 CRIM.L.BULL. 309 (July-August 1986).

[9] 105 S.Ct. 1694 (1985).

Your Bookshelf on Review

EDITED BY J. E. BAKER

Federal and State Corrections Administrator, Retired

A Critical Look at Courts and Corrections

Vigilante: The Backlash against Crime in America. By William Tucker. New York: Stein and Day, 1985. Pp. 347. $16.95.

Despite its title, this book is not primarily about private vigilantism. Rather, journalist William Tucker uses vigilante episodes such as that of Bernhard Goetz as a springboard for a wide-ranging, trenchantly critical examination of the American criminal justice system. The United States now has the highest crime rate in the industrialized world. Why?

Discussing the appalling rates of black crime, Tucker points to the history of lax law enforcement in black communities. In the South this was based on a patronizing, even contemptuous, attitude toward black crime: "It doesn't matter as long as they do it to each other." In the North, this attitude masquerades as "liberalism": black crime is caused by poverty and slums, so it must not be judged harshly. But the author argues that black people would welcome a tough crackdown on crime in their neighborhoods. Many New York City blacks, for example, *applauded* Bernhard Goetz.

When criminals are apprehended, courts and criminal procedures have become so defendant-oriented that the chances of punishment are iffy at best. The exclusionary rule, whereby confessions or physical evidence are excluded from a trial if "unlawfully" obtained, has no effect on the innocent, argues Tucker, but protects only the guilty. The Federal writ of habeas corpus, which until 1915 was invoked for state prisoners only where no charges had been filed, is now commonly used by Federal courts to second-guess state convictions. As a result, twelve thousand habeas corpus petitions are now pending in Federal courts, and no conviction is ever final. Much of the decisionmaking power in criminal cases has thus been transferred from juries to appellate court judges. The jury must be restored, urges Tucker, to its primary truth-seeking role.

With 150,000 private defense attorneys, it is little wonder that the American bar and, inevitably, many judges, are defendant-oriented. To help redress this balance, the author proposes privatizing the prosecutorial function: victims should be enabled to hire their own lawyers to prosecute. In this way victims' rights could start getting the same kind of sustained, organized attention that defendants' rights now receive.

Tucker excoriates the corrections field as well. None of the various program approaches to the rehabilitiation of criminals, he claims, has worked to reduce recidivism, which remains at about 65 percent for all offenders.

Rather, the author argues for the primacy of deterrence in changing criminal behavior. He notes that classic penal reformers such as Beccaria, Bentham, and Mill, while seeking to humanize prison conditions, nevertheless emphasized the need for swift and certain punishment for crime. Hence, American corrections ought to move toward the incarceration of more offenders, for determinate periods. To do this more economically, state corrections systems are increasingly "contracting out" to private prisons; two dozen are now operating around the country.

Vigilante brings a strong gust of fresh air and common sense to the subject of criminal justice. Corrections practitioners—even those who may disagree with many of the book's policy prescriptions—will find it absorbing and challenging.

Baltimore, Maryland THOMAS J. SEESS, PH.D.

Oceans Apart

Prisoners and the Law. Edited by Ira P. Robbins. New York: Clark Boardman Co., Ltd., 1985. $75.

Accountability and Prisons—Opening Up a Closed World. Edited by Mike Maguire, Jon Vagg, and Rod Morgan. London and New York: Tavistock Publications, 1985. Pp. 308. £8.50.

The 18th century historian Gibbon said of Corsica that its conditions were easier to deplore than describe; this could also be said of prisons on both sides of the Atlantic. These two books represent the "state of the art" in prisoner civil rights. More than just an effort to deplore or describe, they point the way for future developments in correctional reform.

The size of a prison population, and the conditions in which it is held, are ultimately political matters. America's rate of imprisonment is about 300 per 100,000, against 88 per 100,000 in the United Kingdom, although

it should be noted that the latter is one of the highest custody rates in Europe. Both the U.S. and U.K. have escalating prison populations and consequently increased overcrowding, but these are issues of negligible voter interest. Courts have become the principal agent for change in both countries, but by different routes and to a substantially different extent.

In the U.S., Federal courts—invoking the Constitution and using class action and totality of conditions law suits—have supervised prison litigation in two-thirds of the states. In Britain, these devices do not exist, and it is very difficult for a prisoner to bring a case to court. In *Wolff v. McDonnell* (1974), the Supreme Court recognized that although prisoner rights were unavoidably diminished by imprisonment, "there is no iron curtain drawn between the Constitution and the prisons of this country." It took the House of Lords until 1982 in *Raymond v. Honey* to acknowledge that "A convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication," but it is still unclear what the precise extent of such "civil rights" may be.

Although courts continue to intervene in America's worst institutions, the Supreme Court's preference for judicial restraint has slowed the expansion of correctional law almost to a halt. As for prisoner civil rights, the U.K. is even further behind the U.S. in those than in episodes of "Dallas," yet the scope of successful litigation is expanding there, albeit incrementally. Change has been mandated by an aspect of Britain's European responsibilities it would often rather ignore—the European Convention of Human Rights. This has not been incorporated into U.K. law and is therefore not enforceable by U.K. courts, but Britain is bound by decisions of the European Court of Human Rights. British prisoners have successfully challenged several aspects of prison administration in the European Court, most notably restricted access to lawyers.

Prisoners and the Law (formerly the *Prisoners' Rights Sourcebook* series, now published in a looseleaf format) is a compilation of articles by 30 leading American authorities, including Federal judges, magistrates, civil rights lawyers, and law professors. Twenty people contributed to *Accountability and Prisons* but none were judges—a fair reflection of the degree of judicial interest in prison issues in England. However, the authors represent a broad range of interests: lawyers; academics; researchers from the Home Office (the government body responsible for prisons, police, and the lower courts); and members of Her Majesty's Prison Service. *Accountability* has a strong European orientation, reflecting the strong influence of the European Commission and Court of Human Rights, but the book also contains chapters from Canadian and American authorities.

Prisoners and the Law contains an overview of prison law; litigating and enforcing the rights of prisoners; procedural aspects of prisoner litigation; special issues and problems (including the rights of gay prisoners and the legal aspects of prison riots); and the future of prison reform. The volume also contains a prisoners' assistance directory. *Accountability* covers prisoners' rights and the law; the case for prison standards; airing grievances; management and discipline; and overseas comparisons.

Of particular interest to probation officers, the American book discusses the use of presentence investigation reports in the parole process and whether the PSI is an agency record for Freedom of Information Act purposes. Concluding that it is, the author (a former member of the U.S. Parole Commission) recommends that a prisoner be allowed to keep those sections of the PSI dealing with the facts of the current crime and his criminal history.

London, England JOYCE PLOTNIKOFF

Alcohol and Other Substance Abuse

Psychosocial Issues in the Treatment of Alcoholism. Edited by David Cook, Shulamith Straussner, Christine Fewell. New York: The Haworth press, Inc., 1985. Pp. 134. $16.95 (paper); $22.95 (cloth).

The Substance Abuse Problems, Volume Two: New Issues for the 1980s. By Sidney Cohen. New York: The Haworth Press, Inc., 1985. Pp. 323. $34.95 (hard); $19.95 (soft).

The Haworth Press has introduced two volumes on the subject of substance abuse. Although the subject matter is similar in each book, the style and approach are strikingly different; while the first book to be discussed is a contribution from the field of social work and assumes a psychosocial perspective, the second offering is a medical presentation.

Psychosocial Issues in the Treatment of Alcoholism is a collection of journal articles published previously under the same name by the new and excellent alcoholism treatment journal, *Alcoholism Treatment Quarterly*. In my research and social work, in fact, I have utilized this highly relevant treatment edition over and over.

The introductory selection, "The Compatibility of the Disease Concept with a Psychodynamic Approach in the Treatment of Alcoholism," stands out from the others in its theoretical and critical orientation, and the article is an appropriate starting point for the consideration of direct practice techniques that follow.

Of special value for those in the criminal justice field is the second article, "Strategic Treatment Techniques

in Alcoholism Treatment: Valuable Tools for Dealing with Resistance." The strategies offered are highly applicable for work with the involuntary client or subject.

My personal favorite, however, is the paper by Nichols, "Theoretical Concerns in the Clinical Treatment of Substance-Abusing Women: A Feminist Analysis." Female addiction is examined from a sociopolitical perspective, and treatment suggestions are made accordingly. Turner and Colao's interdisciplinary article on the treatment of alcoholics who had been sexually assaulted is a major contribution to both the fields of victimology and addictions treatment.

Sidney Cohen, M.D., is the author of the second book, *The Substance Abuse Problems*. This publication is a reprinting of excerpts from the *Drug Abuse and Alcoholism Newsletter* which is widely read by practitioners in the addictions field. Because Cohen is trained in pharmacy and medicine both, the articles have a strong, physiological bent. Presentations are factual, scientific, and useful for background knowledge for treatment of the alcoholic/addict. Each presentation, on a topic often unrelated to the other topics, is almost exactly five pages in length as befits the journalistic origins of the material. Nevertheless, the uniqueness and importance of the subject matter covered more than compensates for the choppy nature of the organization. Some sample titles are: The Oriental Syndrome, Paragoric, The Blood Alcohol Concentration, Marijuana Use Detection.

Topics are arranged, somewhat artificially, under the headings (1) the cocaine issues, (2) the marijuana issues, (3) the alcohol issues, (4) other mind-altering substances, (5) how drugs change people and society, (6) an assortment of issues. My favorite article, under the alcohol-issues rubric is, "Blackouts: You Mean I Did That Last Night?"

The writing style is exceptionally good. The level of scholarship and documentation is high. Despite the overall, disjointed nature of the presentation, the information provided is invaluable for those who work with chemically dependent offenders or clients. Sidney Cohen has made a major contribution to the dual fields of medicine and drug abuse studies.

Bowling Green, Kentucky KATHERINE VAN WORMER, PH.D.

Alcoholism: Models, Theories, Definitions

Becoming Alcoholic: Alcoholics Anonymous and the Reality of Alcoholism. By David R. Rudy. Carbondale and Edwardsville, Illinois: Southern Illinois University Press, 1986. $7.95.

The author attended open and some closed meetings of Alcoholics Anonymous (A.A.) in "Mideastern City" for 16 months, visited members at home and at work, and spent time at the two open houses and service center. The history and structure of A.A. were summarized and the relationships to dominant sociological models, theories, and definitions of alcoholism were covered. The processes involved in becoming alcoholic, how the alcoholic becomes affiliated with A.A., and the relationship between the world of A.A. and that constructed by alcohologists outside A.A. were explored.

While A.A. is technically about 50 years old, having been organized in Akron, Ohio, in 1935 by "Bill W" and "Dr. Bob," its forerunners go back another century or so. The Washingtonian movement grew in the 1850's and afterward to help alcoholics in successful renunciation, but it came to an end when it became involved in political issues, particularly temperence and prohibition, which gave rise to one of the Twelve Traditions to avoid outside issues. The Oxford Group grew slowly in the early 20th century and became solidified in 1926. Some of the Twelve Steps and the religious fervor came directly from the Oxford Group. Religious conversion and acceptance of the A.A. process are similar. The successful A.A. affiliate is characterized by group dependency needs, proneness to guilt, social processes that label him as deviant, and physical stability.

The type of affiliation with A.A. is dependent upon persons' perception of life events as described in their testimonials as to how they were (drunkalogue), what happened, and how they are now (sobriety). The author examined 130 explanations that could be classified into two broad categories, (1) disease explanations and (2) moral explanations. Disease explanations tend to be more prevalent in early testimonials, which divest the alcoholic of blame, while the moral explanations tend to be more prevalent later, and alcoholism is seen as caused by character flaws and becomes the responsibility of the individual. The A.A. ideology is strong, and many of the explanations were seen as "vocabularies of motive" that reflect A.A. ideology.

Analysis of the testimony revealed two broad themes, (1) time of alcoholic self-definition and (2) drinking emphasis. A four-cell classification of these categories provides a useful understanding of problem drinkers. First, self-definition before A.A. affiliation and high drinking emphasis produces the "Pure Alcoholic" (30 percent), who is an extremely heavy drinker. Secondly, self-definition after A.A. affiliation and high drinking emphasis produces the "Convinced Alcoholic" (43 percent), who readily discusses heavy drinking and explains other problems that cause drinking. Thirdly, self-definition before A.A. affiliation, but with low drinking emphasis, is the "Tangential Alcoholic" (10 percent), who is characterized by other problem behaviors, such as mental illness and other problems that really make the drink-

ing tangential. Fourthly, self-definition after A.A. affiliation and low drinking emphasis is the "Converted Alcoholic" (17 percent), who believes that drinking is affecting his life or that significant others, such as employers or officials, are forcing him to come for treatment.

E.M. Jellinek's phase alcoholism, developed in 1946, was the result of a study of 98 "usable" questionnaires from more than 1,600 responses from A.A. members returning the questionnaires from their printing in the monthly *Grapevine* distributed to A.A. members through their groups. The four phases were (1) prealcoholic symptomatic phase characterized by progression from occasional to almost daily relief drinking, (2) prodromal phase marked by blackouts, losses of memory, and prolonged intoxication, (3) crucial phase characterized by loss of control over drinking, and (4) chronic phase, during which the drinker can no longer remain sober in the daytime and engages in prolonged intoxication, impairment of thinking, psychomotor inhibition, and other signs of loss of control. Criticism of Jellinek's model focuses on a wider distribution of characteristics than Jellinek shows in these phases and holds that blackouts and loss of control appear in several phases. Critics have said that A.A. members may view alcoholism as a disease, but persons seeing a clinical psychologist may view alcoholism as a habit or conditioned response that can be extinguished or diminished. A.A.'s medical/moral model reflects A.A. ideology and has attracted many affiliates, but there are other approaches.

Behavior is usually defined from one of two major theoretical/philosophical approaches: (1) the positive or objective approach with a unitary or diverse list of symptoms and causes and (2) the interactionist or subjective approach in which deviance is defined by people in a given situation and is viewed as collective action. Positivist definitions are subject to truth claims, and the gulf between what people in society believe and what is actually known is extreme. "Alcoholism" is attached to drinkers by others when it becomes obviously deviant. The "collective conscience" attacks drinking and "slipping" as deviant, thereby reaffirming the norms in a boundary maintenance funcion—or setting the limits to conformity. Other people become concerned when those limits are tested, whether by alcoholism, crime, or other deviations. Societal responses to drinking, then, sometimes become more of a cause than a cure, since society focuses on deviant behavior in its boundary maintenance functions.

Depending upon a group's value system, definitions regarding alcohol use are developed and utilized to make sense out of the world. The diversity of cultural differences in drinking practices is matched by the diversity of cultural views in defining deviant drinking. Asking "why?" is the wrong question, because it is "analyzing not utilizing." "Alcoholics are different in so many ways that it makes no difference" how they got there. Just as there is no definable way that leads to alcoholism, there is no single way out of it. Intellectually and factually, a wide range of treatment approaches that have worked somewhere appear in the literature. The author of this book would go the A.A. route because it has worked well for so many people.

Tallahassee, Florida VERNON FOX, PH.D.

Criminal Justice: A Political View

The Politics of Law and Order—Street Crimes and Public Policy. By Stuart A. Scheingold. New York: Longman, Inc., 1984. Pp. 238. $22.50.

I certainly believe that sometimes an interdisciplinary approach in any book is more profound and informative than a single disciplinary approach. The author is a political scientist and his approach is interdisciplinary, combining the fields of political science with criminal justice. However, I notice very often that authors who display an interdisciplinary approach sometimes unconsciously subvert the discipline that is not their primary field of expertise or knowledge.

Scheingold definitely takes a political view toward criminal justice. He believes that the goal of criminal justice is law and order and that much of what transpires in our criminal justice institutions—e.g., police, courts—is geared toward law and order and a punitive perspective, although he states that the politics of law and order are independent of crime and criminal justice. In addition, he believes that politicians take advantage of the public's state of mind by building an effective political campaign on the crime issue, that they make promises in criminal justice that they cannot possibly keep, and that they are forced to propose simple solutions to the complicated problem of crime. He also believes that our institutions, the police and the courts, defy reform of any type and must continue toward punitive means and ends in order to placate politicians. He claims that his political theories in relation to crime are on a theoretical level and must yet be tested empirically.

I believe that criminologists have known for years that much that has taken place in criminal justice is politically oriented. Criminologists have suggested that politics has been responsible for policy in criminal justice, e.g., determinate sentencing, police organizations, plea bargaining, corrections, etc. What I am saying is that I don't believe Scheingold is telling us something new that we don't already know or can infer from our knowledge of the literature.

Scheingold reviews the literature on the police and courts in great detail. However, an experienced criminologist knows all this literature. Most of the literature he reviews is superficial and not relevantly tied to his principal thesis.

Even if one concedes that Scheingold is proposing a new theory, I don't believe he has worked out all the propositions and theorems into a coherent, logical, interconnected body of knowledge. It is unclear to me whether he believes that the political orientation of law and order is beneficial and should be continued, for he states that the courts, in spite of their faults, function in a predictable and equitable fashion (p. 169). He believes that the shortcomings of our criminal courts are due to basic social problems in our society. He also believes that bias in our courts is marginal. He doesn't discuss corrections to a great extent, concentrating mainly on the police and the courts. He claims that there are two distinct viewpoints in criminal justice, the conservative and liberal, although he believes that James Q. Wilson, whom he paraphrases a great deal, is midway between the conservatives and liberals, and he talks about a Marxist perspective. I believe after reading this book that Scheingold takes the structural-functional approach, although he doesn't definitely admit it. Scheingold closes by proposing neighborhood justice as a possible means to reform for our crime problems, although he is skeptical about the results.

Now I am not stating that this book is useless, for it does have merit. Perhaps what Scheingold says is more relevant to political science than to criminal justice, and perhaps criminologists don't know the symbolic significance of what he says. However, many criminologists are social scientists and can recognize theoretical significance in criminal justice. His review of the literature is good for one who wants an overall review of the police and courts, although it certainly isn't complete. He does make some thought-provoking statements independent of his theory, e.g., much in criminal justice defies complete quantitative analysis. I believe that reviewing all the literature for purposes of verifying an innovative orientation may not be completely valid, because criminal justice findings extend in many directions. However, I do believe that this book should be read by all serious students of criminal justice.

New York, New York JAMES R. DAVIS, PH.D.

Getting Better, Not Older

Theoretical Criminology (3rd Edition). By George B. Vold and Thomas J. Bernard. New York: Oxford University Press, 1986. Pp. 374. $19.95.

This third edition should surely confirm that *Theoretical Criminology* is a classic in the field of the study of crime. The first edition was published by George B. Vold in 1958 and was well received. Although Vold died in 1967, Bernard, without ever having known Vold, published the second edition in 1979. In that edition, Bernard introduced new material but made an effort to remain true to Vold's original work.

In this third edition, Bernard takes more liberties in reshaping the book. Not only are chapters reduced by one and the pages by 59, but there is considerable revision of the content, especially the more current material. Most chapters are approached historically with descriptions, analyses, and critiques of major theoreticians and their theories. Frequently the chapters end with a discussion of the policy implications of the theories which adds a pragmatic dimension.

The book begins briefly with the earliest explanations of crime, and then it moves to the classical, neoclassical, and positivists schools. In regard to the latter, "(m)ost contemporary scientific criminology is positivist in method and in basic formulations," according to the authors. Following the positivist school, are theories based on physical characteristics, intelligence, biological factors, personality, and poverty.

Next, the authors give due credit to Emile Durkheim's contribution to criminology with his emphasis on the impact of social forces on human conduct. This was a substantial break with previous thinking which held that people acted from free will (classical school) or that their behavior was shaped by "inner forces of biology and psychology" (positivist school). After Durkheim, there are chapters on the ecology of crime and the influence of the University of Chicago, strain theories, criminal behavior as normal learned behavior, social control theories, and deviance and social reaction.

Conflict criminology is obviously the area most favored by Vold and Bernard. Vold's first edition provided his own group conflict theory which was, according to Bernard, well received and influenced "the later development of conflict theory in criminology." Bernard offers his "unified conflict theory" influenced by Vold and others. In brief, conflict criminology maintains that crime is related to power: the more power a group has, the lower its official crime rates, and the less power a group has, the higher its official crime rates. Marxist criminology is presented in a separate chapter even though Marx was the "most famous" of the conflict theorists. The distinction is made that Marxist criminology is a narrower application of general conflict theory, with the former focusing not on "power," but more specifically on political and economic systems.

Victimless crime, organized crime, and white-collar crime are combined in one chapter as opposed to the three chapters devoted to those subjects in the second edition. In the final two chapters, Bernard ties it all together. He notes that while the physical sciences are more than 2,000 years old, systematic criminology was virtually nonexistent prior to the inception of the classical school 200 years ago, with the actual scientific study of criminal behavior beginning about 100 years ago with Lombroso. For the future, a great deal needs to be done both with theory and empirical research to support the theory. The authors' concluding sentences are, "Much is already known about the phenomenon of crime. Future developments in theoretical criminology will result primarily from making sense out of what we already know."

This very readable book will undoubtedly continue to be popular, primarily in college classes, but should be valuable to anyone with an interest in theory. It provides an excellent overview of many of the criminal theories with abundant references and recommended readings. Although the authors have their favorite theory and so express it, they make no claim to having the answers to criminal behavior.

McAllen, Texas PAUL W. BROWN

A Recommended Text

Correctional Treatment: Theory and Practice. By Clemons Bartollas, Englewood Cliffs, New Jersery: Prentice Hall, Inc., 1985. Pp. 304.

The book's format is appropriate for an upper division college class. There are 18 weeks in a semester including breaks. This book gives about a chapter per week. Organizing the book in four sections is a good idea, since such arrangement allows for systematic and timely testing on the subject matter. The book is set up so that tests to reach "closure," or comprehensive tests, are logical. Too many times, those of us who like comprehensive exams are not provided the opportunity by book organization to give periodic exams to reinforce the material covered. The four-part model provides this.

The content lends itself to an upper division (300 and 400) level course designed for college juniors and seniors. The "introduction" does a good job summarizing what we teach at Eastern Kentucky University in our freshman and sophomore courses (100 and 200 levels).

At first glance, I must admit that I was turned off by the personal interviews of Ted Palmer, David Fogel, et al. These theorists many times are misinterpreted. Anytime an author attempts to paraphrase another, he enters his own biases. I like the idea of printing their thoughts verbatim. I have a more favorable opinion of Fogel and Wilson because of this book.

When I first began reading the book I thought that Bartollas was covering a lot of territory in too few words, for instance, in Chapters 5, 6, and 7 (respectively, "Community Based Programs—Juveniles," "Community Based Programs—Adults," and "Treatment Technologies in Correctional Institutions"). In my experience, when a student is "hit" with a multiple of concepts, the tendency is to be confused. However, in an upper division course, they should have been exposed to this material. As a treatment technique oriented person, I especially enjoyed Chapter 7. We have a supplement course that takes the treatment techniques, explains them comprehensively, and puts them into practice. This chapter fits well with this class.

We have a void in our system in that we cover the "treatment" category but do not speak of the history of treatment. Retribution to reintegration is "touched on" but not addressed as Bartollas records it.

In summary, I feel there is a need for the book. It should be in the upper division category (junior/senior) and should be required before the treatment techniques are taught indepth and put into practice.

Richmond, Kentucky BRETT D. SCOTT, ED.D.

Reports Received

Accreditation: Blueprint for Corrections. Commission on Accreditation for Corrections, Rockville, Maryland, February 1986. Pp. 21. This publication explains the accreditation process as administered by the Commission.

Bulletin of the Criminological Research Department. Research and Training Institute, Ministry of Justice, Japan. Pp. 19.

Delinquent Networks. By Jerry Sarnecki. The National Council for Crime Prevention, Research Division, Stockholm, Sweden (Report No. 1986:1). Pp. 184. This is a revision of *Delinquency and Peer Relationships—A Study of Juvenile Delinquency in a Swedish Municipality.* In English.

Information Bulletin on Legal Activities. Directorate of Legal Affairs, Council of Europe, February 1986. Pp. 50.

National Conference on Prison Industries: Discussions and Recommendations. National Center for Innovation in Corrections, The George Washington University, June 1986. Edited by Dr. Gail S. Funke, this report presents recommendations designed to provide new interest among business and union leaders, and in the private sector generally, and to provide states with guidelines for mod-

ernizing and expanding prison industries.

NIJ Reports: Prosecuting Child Sexual Abuse—New Approaches. National Institute of Justice, U.S. Department of Justice, May 1986. Pp. 32. This issue reports on new techniques for reducing the stress on children who testify during the prosecution of child abuse cases.

Report for 1984 and Resource Material Series No. 27. United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), Fuchu, Tokyo, Japan, April 1985. Pp. 213. Included in this report are a summary of UNAFEI's 1984 activities, an outline of the organization's prospects for 1985, and materials from the 67th International Training Course, "An Integrated Approach to Drug Problems."

Resource Material Series No. 28. United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), Fuchu, Tokyo, Japan, December 1985. Pp. 251. This provides the materials produced during UNAFEI's 68th International Seminar, "Contemporary Asian Problems in the Field of Crime Prevention and Criminal Justice, and Policy Implications."

Risk and Recidivism Among Massachusetts Parolees: An Exploratory Study. Executive Office of Human Services, Massachusetts Parole Board, Boston, 1986. Pp. 22. The report follows 120 parolees released from state facilities and 138 parolees released from county facilities to compute their respective recidivism rates.

Summary of the White Paper on Crime. Research and Training Institute, Ministry of Justice, Japan, 1985. Pp. 172.

UNAFEI Newsletter. United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, Fuchu, Tokyo, Japan, March, July, and December 1985, Nos. 55-57. UNAFEI's 68th, 69th, and 70th international seminars are reported on in each of these issues.

Books Received

A History of English Criminal Law and its Administration, Volume 5, *The Emergence of Penal Policy.* By Sir Leon Radzinowicz and Roger Hood. London: Stevens and Sons Limited, 1986. Pp. 1,101. $126.50.

Breaking Free From Violence: A Personal Growth and Safety Manual for Law Enforcement Officials and Other Helping Professionals. By Jerry Lee Brinegar. New York: Gardner Press, Inc., 1986. Pp. 207. $22.95.

Criminal Behavior Systems (2nd edition). By Marshall B. Clinard and Richard Quinney. Cincinnati, Ohio: Anderson Publishing Company, 1986. Pp. 274.

Prisoners' Rights in America. By Barbara B. Knight and Stephen T. Early, Jr. Chicago: Nelson-Hall Publishers, 1986. Pp. 402. $35.95.

The Murderer and His Victim (2nd edition). By John M. Macdonald, M.D. Springfield, Illinois: Charles C. Thomas, Publisher, 1986. Pp. 328.

The Psychology of Judicial Sentencing. By Catherine Fitzmaurice and Ken Pease. Manchester, England: Manchester University Press, 1986. Pp. 174. £ 19.95.

The Reasoning Criminal: Rational Choice Perspectives on Offending. Edited by Derek B. Cornish and Ronald V. Clarke. New York: Springer-Verlag, 1986. Pp. 246. $39.50.

Understanding and Controlling Crime: Toward a New Research Strategy. By David P. Farrington, Lloyd E. Ohlin, and James Q. Wilson. New York: Springer-Verlag, 1986. Pp. 211.

It Has Come To Our Attention

David N. Adair, Jr., assistant general counsel, Administrative Office of the United States Courts, is *Federal Probation's* new "Looking at the Law" columnist. Before joining the Administrative Office's Office of General Counsel 3 years ago, Adair was with the Inter-Judicial Affairs Division of the Federal Judicial Center. He has also worked in trial and appellate litigation for the Department of Labor and served as a law clerk in the Western District of Missouri. Adair holds a B.A. degree in philosophy from Northwestern University and a J.D. degree from the University of Michigan. The editorial staff is pleased to have David Adair as a regular contributor to *Federal Probation*.

Fordham University's Department of Sociology and Anthropology, which offers a master's degree in probation and parole studies, has scheduled courses in "Social Conflict and the Probation Officer" and "Criminal Justice Statistics" for the semester beginning December 8, 1986. The courses will be held at the Lowenstein Building in New York City's Lincoln Center. The M.A. program is geared to experienced community corrections workers. Interested persons should contact the program director, Dr. Peter L. Sissons, at Fordham University, Bronx, New York 10458-5160; the telephone number is (212)579-2207/2208.

The Police Foundation, currently researching inner city crime, is planning a **National Symposium on Community Institutions and Inner City Crime,** to be held March 5-8, 1987, in Washington, D.C. The foundation has identified and is researching over 1,000 programs—run by schools, churches, businesses, civic groups, etc.—that address the problem. The symposium will highlight some of the most outstanding inner city crime programs and will emphasize information exchange among practitioners, scholars, and others interested in urban crime control policy and research. For more information, contact the project director, Ann Sulton, at the Police Foundation, 1001 22nd Street, N.W., Suite 200, Washington, D.C. 20037; telephone: (202)833-1460.

The Société Jean Bodin pour L'Histoire comparative des Institutions will hold its next congress in Barcelona from May 25-29, 1987. The theme of the congress is the penal sanction. Public discussion of aspects of the penal sanction topic and round table discussions focusing on geographical areas and historical periods will be featured. For further information, write to Professor J.Vanderlinden, Faculty of Law, CP 137, Free University of Brussels, 50, av. F.D. Roosevelt - 1050 Brussels, Belgium.

Letters to the Editor

A View on Presentence Investigations

TO THE EDITOR:

As the author of "The Probation Officers' Search for Credibility: Ball Park Recommendations" (*Crime and Delinquency,* October 1985), I believe it is important to comment upon a review of the article, written by Charles L. Stearns, which appeared in the March 1985 issue of *Federal Probation.*

I appreciate Mr. Stearns' accurate and perceptive precis. He clearly grasped the content and thrust of my inquiry. However, I would like to clarify one important point; my position on presentence investigations is certainly not "totally opposite" that of Mr. Stearns. On the contrary, my view of this "vital service" closely parallels his own. I, too, believe that the "dynamics of the offender and individualizing recommendations" should be an integral part of presentence investigations. Unfortunately, many probation departments do not foster such a perspective. My study described probation work as it actually occurs, not the way I would like it to be.

Hopefully, with officers like Mr. Stearns, the spirit of independent reporting will remain alive among presentence investigators. If my article causes probation officers and their supervisors to reexamine their motives and operational practices, then it will have achieved its purpose.

June 1, 1986

JOHN ROSECRANCE
Department of Criminal Justice
University of Nevada, Reno

Contributors to this Issue

CHARLES M. FRIEL: Professor, Criminal Justice Center, Sam Houston State University, since 1967. B.A. (1962), M.A. (1964), and Ph.D. (1967), Catholic University of America, Washington, D.C. Author of "Correctional Programs," in *Information Policy and Control Policies,* Alan F. Weston (ed.), Bureau of Justice Statistics, U.S. Department of Justice.

JOSEPH B. VAUGHN: Doctoral Fellow, Criminal Justice Center, Sam Houston State University. B.S. (1980), Drury College; M.S. (1983) and Ed.S. (1984), Central Missouri State University. Chief Deputy Sheriff, Camden County, Missouri Sheriff's Department, 1977-80; Special Agent, INS Investigations Bureau, 1980-81; Sergeant/Chief Deputy, Camden County, Missouri Sheriff's Department, 1981-84; Adjunct Professor, Drury College, 1983-84. Author of "Legal Issues in the Use of Electronic Surveillance in Probation," *Federal Probation* (1986).

JOHN H. KRAMER: Executive Director, Pennsylvania Commission on Sentencing, since 1979, and Associate Professor, Pennsylvania State University, since 1973. B.A. (1966), Ohio State University; M.A. (1970) and Ph.D. (1975), University of Iowa. Family Counselor, Iowa Department of Corrections, 1969; Assistant Professor, Mankato State University, 1971-73. Author of *The Juvenile Justice System* (1976); *Introduction to American Corrections* (1976); "Defining Determinacy," *Justice Quarterly* (1984); "Pennsylvania's Sentencing Reform: The Impact of Commission Established Guidelines," *Crime and Delinquency* (1985).

ANTHONY J. SCIRICA: Judge, United States District Court, Eastern District of Pennsylvania, since 1984. B.A. (1962), Wesleyan University; J.D. (1965), University of Michigan Law School. Former Chair, Pennsylvania Commission on Sentencing.

IRA P. ROBBINS: Barnard T. Welsh Scholar and Professor of Law, The American University, Washington College of Law, since 1979. A.B. (1970), University of Pennsylvania; J.D. (1973), Harvard University. Law Clerk, United States Court of Appeals for the Second Circuit, 1973-75; Associate Professor of Law, University of Kansas School of Law, and Director, Kansas Defender Project, 1975-79; Acting Director, Division of Continuing Education and Training, Federal Judicial Center, May 1986 - August 1986. Author of *The Law and Processes of Post-Conviction Remedies* (1982); *Prisoners and the Law* (1985); "The Habeas Corpus Certificate of Probable Cause," *Ohio State Law Journal* (1983); "Attempting the Impossible: The Emerging Consensus," *Harvard Journal on Legislation* (1986).

JULIE LEIBRICH: Senior Research Officer, Planning and Development Division, Department of Justice, Wellington, New Zealand, since 1984. M.A. (1970), Edinburgh University; B.A. (1976) and Ph.D. (1982), Victoria University of Wellington. Research Psychologist, Medical Research Council Project, New Zealand, 1980-82; Research Officer, Department of Justice, New Zealand, 1982-84. Author of "The Use of Community Service Orders," *Australian and New Zealand Journal of Criminology* (1985); "Community Service Sentencing in New Zealand: A Survey of Users," *Federal Probation* (1986).

KEN PEAK: Chairman and Assistant Professor, Department of Criminal Justice, University of Nevada, Reno. B.S (1973) and M.S. (1973), Pittsburg State University; Ph.D. (1983), University of Kansas. Patrol Officer, City of Pittsburg, Kansas, 1970-74; Criminal Justice Planner, Southeast Kansas, 1974-76; Chief of Police, Pittsburg State University, 1976-78; Assistant Professor, Wichita State University, 1978-83. Author of *Bootlegging in the Kansas Balkans* (1986); "Correctional Research: Theory and Praxis," *Criminal Justice Review* (1985); "The Cost of Public Safety," *American School and University* (1986).

SALVATORE CERRATO: Correction Officer, Essex County Jail, Newark, New Jersey, since 1973. B.A. (1972), Newark State College, M.A. (1981), New School for Social Research.

H. R. "HANK" CELLINI: Correctional Program Specialist, National Institute of Corrections, Boulder, Colorado, since 1985. B.S. (1973), M.S. (1975), and Ph.D. (1981), Southern Illinois University. Assistant Professor and Director of Rehabilitation Counselor Training, University of New Mexico, 1982-83; Chief Psychologist, New Mexico Department of Corrections, 1983-85. Author of "Rehabilitation Services for American Indians: Learning Disabilities and Juvenile Delinquency," *Journal of Rehabilitation* (1986).

CHARLES E. SMITH: Professor of Psychiatry, School of Medicine, University of North Carolina at Chapel Hill, since 1967. A.B. (1939) and M.D. (1941), George Washington University. Director, Mental Health Service, North Carolina Department of Corrections, 1974-81. Author of *Prison Health Services and Forensic Psychiatry.* Life Fellow, American Psychiatric Association.

RICHARD REID FELIX: Psychiatrist in Private Practice, since 1980. B.S. (1968) and M.D. (1972), Ohio State University. Staff Psychiatrist, North Carolina Department of Correction, 1975-77; Staff Psychiatrist, North Carolina Department of Human Resources, 1977-79; Clinical Assistant Professor of Psychiatry, University of North Carolina, 1977-present; Clinical Assistant Professor of Family Medicine, University of North Carolina, 1985-present. Author of "A Clinical Clerkship in a State Hospital: Successful Affiliation," *North Carolina Journal of Mental Health* (1981). Fellow, American Psychiatric Association.

KAREN M. JENNISON: Assistant and Associate Professor, Department of Sociology, University of Northern Colorado, since 1972. B.A. (1962), University of Kansas; M.A. (1965), Washington University (St. Louis); and Ph.D. (1974), Washington State University. Author of "Public Attitudes Toward Victimless Crimes in Idaho," *Journal of the Idaho Academy of Science* (1975).

GAD S. BENSINGER: Professor and Chairman, Criminal Justice Department, Loyola University of Chicago, since 1986. Ph.D. (1971), Loyola University of Chicago. Associate Director, Cook County Sheriff's Youth Services Department, 1971-72; Director, Cook County Criminal Justice Training and Leadership Development, 1972-77; Social Planner, Social Services Department, City of Beer-Sheva, Israel, 1971-80; Associate Professor of Criminal Justice, Loyola University of Chicago, 1982-86. Member of Citizens Committee on the Juvenile Court of Cook County. Editor, *Annals of the Illinois Academy of Criminology.* Author of *A Survey of Criminal Justice in Israel* (1983).

MAGNUS J. SENG: Associate Professor, Criminal Justice Department, Loyola University of Chicago, since 1986. B.A. (1956), St. Francis Xavier University (Canada); M.S.W. (1958), Catholic University of America; Ph.D. (1970), University of Chicago. Parole Counselor, John Howard Association (Canada), 1958-60; Probation Supervisor and Training Instructor, Juvenile Court of Cook County (Chicago), 1964-70; Associate Director, Illinois Law Enforcement Commission State Planning Agency, 1970-80; Assistant Professor, Criminal Justice Department, Loyola University of Chicago, 1981-86.

REVIEWERS OF PERIODICALS

EUGENE H. CZAJKOSKI, D.P.A., is Dean, School of Criminology, Florida State University, Tallahassee.

VERNON FOX, Ph.D., is Professor Emeritus, School of Criminology, Florida State University, Tallahassee.

CANDACE McCOY is with the Policy Foundation, Washington, D.C.

CHARLES L. STEARNS is Supervising Probation Officer, U.S. District Court, West Covina, California.

BOOK REVIEWERS

PAUL W. BROWN is United States Probation Officer, Southern District of Texas.

JAMES R. DAVIS, Ph.D., is Probation Officer, New York City Department of Probation.

VERNON FOX, Ph.D., is Professor Emeritus, School of Criminology, Florida State University, Tallahassee.

JOYCE PLOTNIKOFF is Court Management Consultant, London, England.

BRETT D. SCOTT, Ed.D., is Associate Professor, Eastern Kentucky University, Richmond, Kentucky.

THOMAS J. SEESS, Ph.D., is Agent, Maryland Parole and Probation Division, Baltimore.

KATHERINE VAN WORMER, Ph.D., is with the Community Alcohol Center, Longview, Washington.

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6. All quoted matter of more than three lines may be typed single space and indented on both sides.
7. Insert each footnote at the bottom of the page carrying the footnote reference. Use the footnote style illustrated below.

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1. Sheldon and Elinor T. Glueck, *500 Criminal Careers.* New York: Knopf Publishing Company, 1930, p. (or pp.).

2. Edwin Powers, "An Experiment in Prevention of Delinquency," *The Annals of the American Academy of Political and Social Science, January 1949, pp. 77-78.*

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